NO. 87-842

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRIS METHODIST H-E-B BOARD OF TRUSTEES (formerly HURST-EULESS-BEDFORD HOSPITAL BOARD OF TRUSTEES)

and

HARRIS METHODIST AFFILIATED HOSPITALS (formerly METHODIST AFFILIATED HOSPITALS)

Petitioners,

v.

A. M. JATOI, M.D.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a private hospital which leases facilities from a municipal hospital authority engage in state action or action under color of state law when it refuses to reappoint a physician to its medical staff if the authority plays no role in the decision to deny reappointment and does not profit by or receive any benefit from that decision?

2. Did the court of appeals err in refusing to review the Rule 41(b) dismissal of a physician's discrimination claims under 42 U.S.C. §§ 1981 and 1985 on the sole ground that the district court's findings and conclusions were "too incomplete to affirm" where the hospital's legitimate, nondiscriminatory reasons for its actions were in evidence and the district court found no basis from which it could be inferred that the hospital's actions were more likely than not based upon discriminatory factors?

3. Did the court of appeals err in reversing the judgment in favor of Methodist Affiliated Hospitals, an entity never linked by summary judgment evidence or evidence at trial with the case at bar?

4. In light of *Bhandari v. First National Bank of Commerce*, No. 85-3445, Slip Op. 187 (5th Cir. 1987), should this Court now hold that 42 U.S.C. § 1981 does not protect against private discrimination based on alienage, national origin, and foreign education?

LIST OF ALL PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS

Plaintiff in the District Court: A.M. Jatoi, M.D.[1]

Defendants in the District Court: (1) Hurst-Euless-Bedford Hospital Authority;[2] (2) Hurst-Euless-Bedford Hospital Medical Board (now Harris Methodist H-E-B Medical Board);[3] (3) Hurst-Euless-Bedford Hospital Board of Trustees (now Harris Methodist H-E-B Board of Trustees);[4] and (4) Methodist Affiliated Hospitals (now Harris Methodist Affiliated Hospitals).[5]

Harris Methodist Health System (formerly Harris Hospital), a corporation wholly owned by the Central Texas Annual Conference of the United Methodist Church, is the parent corporation of Harris Methodist H-E-B and Harris Methodist Affiliated Hospitals.

The only subsidiary of Harris Methodist H-E-B is Harris Methodist H-E-B Building Corporation. Harris Methodist H-E-B has no affiliates.

The only subsidiaries of Harris Methodist Affiliated Hospitals are Harris Methodist Dublin, Harris Methodist

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1 Dr. Jatoi is the debtor in possession in Case No. 487-42139, In re Alimadad Jatoi, Debtor, In the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division.

2 The Authority is a municipal hospital authority. See page 4, footnote 6, *infra*.

3 The Medical Board is the governing body of the medical staff of Harris Methodist H-E-B and has no existence independent of Harris Methodist H-E-B. TEX. REV. CIV. STAT. ANN. art. 4437f, §§ 2(e) and 17 (Vernon 1976) (as effective before amendments effective May 24, 1985). (App. M, p. A-55 - A-56)

4 The Harris Methodist H-E-B Board of Trustees is the governing body of Harris Methodist H-E-B, a corporate subsidiary of Harris Methodist Health System.

5 Harris Methodist Affiliated Hospitals is a corporate subsidiary of Harris Methodist Health System.

Hamilton, Harris Methodist Stephenville, Walls Regional Hospital, and Methodist Affiliated Building Corporation. Harris Methodist Affiliated Hospitals has no affiliates.

Dated the 12th day of November, 1987.

Tom Renfro/William M. Schur

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There was no written opinion in the District Court.

JURISDICTIONAL GROUNDS IN THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1) (1966).

The judgment of the Court of Appeals was entered on January 14, 1987. The order of the Court of Appeals denying rehearing and rehearing en banc was entered June 18, 1987. This Court has extended the filing deadline for this petition to November 15, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C.A. § 2201(a) (Supp. 1987)

(a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C.A. § 2202 (1982)

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C.A. § 1981 (1981)

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. § 1983 (1981)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C.A. § 1985 (3) (1981)

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the

premises of another, for the purpose of depriving, either directly of indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having or exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

TEX. CONST. art. 9, § 4

See App. L., p. A-54.

TEX. REV. CIV. STAT. ANN. art. 4437e (Vernon 1976 and Supp. 1987)

See App. I, pp. A-33 to A-47.

TEX. REV. CIV. STAT. ANN. art. 4437e-1 (Vernon 1976 and Supp. 1987)

See App. J, p. A-48.

TEX. REV. CIV. STAT. ANN. art. 4437f, (Vernon 1976 and 1987)

See App. M, pp. A-55 to A-56.

1981 TEX. GEN. LAWS, ch. 583.

See App. K, pp. A-49 to A-53.

STATEMENT OF THE CASE

Jatoi's Claims

A. M. Jatoi, a surgeon of East Indian descent, claims that a private hospital denied him due process in refusing to reappoint him to its medical staff. Jatoi claims that discrimination due to alienage, national origin, and foreign

board certification led to the hospital's decision. He seeks injunctive relief, declaratory relief, and attorney's fees under 42 U.S.C. §§ 1981, 1983, and 1985, under U.S. CONST. amend. XIII and XIV, and under 28 U.S.C. §§ 2201-2202.

Background

The Hurst-Euless-Bedford Hospital Authority[6] ("the Authority") opened Hurst-Euless-Bedford Hospital in 1973. Unable to pay the hospital's expenses out of revenues, the Authority sought assistance from Harris Hospital, a church-affiliated private corporation.

In January 1974, Harris Hospital caused a new, non-profit corporation to be chartered under the name "Hurst-Euless-Bedford Hospital." The corporation ("H-E-B") was owned by the Central Texas Conference of the United Methodist Church. Its governing body ("the Board of Trustees") was selected by Harris Hospital.

H-E-B leased the hospital from the Authority in March 1974 for a 99-year term,[7] agreeing that hospital

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[6] The cities of Hurst, Euless, and Bedford, all situated in Tarrant County, Texas, created the Authority under TEX. REV. CIV. STAT. ANN. art. 4437e (Vernon 1976 & Supp. 1987). (App. I, pp. A-33 to A-47)

In Texas, the duty of providing health care to indigent persons is imposed on counties. Cities have no duty to provide hospital services and may not levy taxes for hospital purposes in counties having county hospital districts. TEX. CONST. art 9, § 4. (App. L, p. A-54) Tarrant County has a county hospital district. *See Stern v. Tarrant County Hospital District*, 778 F.2d 1052 (5th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1970, 90 L.Ed.2d 365 (1986).

[7] The statute authorizing authorities to lease hospitals also permits them to enter into management contracts. TEX. REV. CIV. STAT. ANN. art. 4437e-1 (Vernon 1976) (as enacted effective June 14, 1973, prior to 1981 amendment). (App. J, p. A-48) H-E-B leased the hospital and was not the Authority's "private manager" as stated by the *Jatoi* panel. *Jatoi, supra*, 807 F.2d at 1221.

The lease required the Authority to convey the hospital to H-E-B if it became lawful to do so. Legislation permitting that sale was approved on June 15, 1981. 1981 Tex. Gen. Laws, ch. 583, §§ 4-5, at 2363 (codified as TEX. REV. CIV. STAT. ANN. art. 4437e, §§ 5 and 14 and 4437e-1, §§ 1, 3, and 4). (App. K, pp. A-49 to A-53) The act went into effect

revenues would only be used to pay operating expenses, the Authority's bond obligations, and costs of improving the hospital. Under the lease, H-E-B was to provide all personnel required for the hospital's operation. The Authority, as lessor, retained the right to be kept informed about the hospital's operations and finances and to inspect the premises but did not retain the right to participate in managing the hospital or the right to intervene in personnel or medical staff decisions.

Despite his prior history of medical staff problems, Dr. Jatoi joined the hospital's medical staff in 1973 and was reappointed several times. Concerns about his care of patients and refusal to comply with medical records requirements resulted in considerable peer review activity. In 1981, H-E-B's Medical Board ("the Medical Board") recommended against Jatoi's reappointment. H-E-B's Board of Trustees followed that recommendation.

Before Jatoi's reappointment was denied, Jatoi and his attorney attended a hearing before H-E-B's Medical Board. Jatoi, however, claims that H-E-B denied him procedural due process.[8]

The summary judgment evidence proved that the Authority was not involved in the decision to deny reappointment. Finding no state action, District Judge Robert W. Porter granted the Defendants' summary judgment motion with respect to Jatoi's *procedural due process claims* under § 1983. (App. C, pp. A-7 to A-8. See also App. A and App. B, pp. A-1 to A-5.)

(footnote 7 continued)

August 31, 1981. Jatoi had a hearing before the Medical Board on September 15, 1981. The Board of Trustees refused to reappoint him on October 26, 1981. By resolution dated September 30, 1982, the Authority formally approved sale of the hospital. During this time period, H-E-B was not the Authority's "private manager." It was a lessee having a right (later exercised) to purchase the hospital.

[8] Jatoi alleged that he was not provided adequate notice of hearing, that he was denied representation by counsel, that he was not provided with specific charges of misconduct, and that he was not allowed to answer the allegations against him. (R-I, p. 2)

In his complaint, Jatoi attributed H-E-B's actions to discrimination on account of his alienage, national origin, and his English board certification.[9] Judge Porter denied the Defendants' summary judgment motion with respect to Jatoi's *discrimination* claims.[10]

At trial, Jatoi placed in evidence documents articulating the legitimate, nondiscriminatory reasons for H-E-B's actions[11] and attacked those reasons as pretextual. His evidence consisted of anecdotes and speculative accusations intended to prove pretext by showing that his colleagues resented his encroachment on their practices, wanted his patients for themselves, were prejudiced, and used peer review as a pretext for getting rid of competition from minority physicians.[12] He did not allege that H-E-B discriminated against minority physicians as a matter of policy.[13]

Finding no basis for concluding that H-E-B's actions were more likely than not attributable to discrimination, Judge Porter dismissed Jatoi's discrimination claims in response to the Defendants' Rule 41(b) dismissal motion. (App. D, p. A-9)

On appeal, a Fifth Circuit panel held that Judge Porter erred in finding no state action and reversed the summary judgment dismissing Jatoi's due process claim under § 1983. Holding that the findings and conclusions (App. F, pp. A-12 to A-16) were inadequate to permit meaningful appellate review, the panel refused to decide whether or not Judge Porter correctly dismissed Jatoi's discrimina-

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[9] (R-I, pp. 2-3). Jatoi has been a citizen of the United States since 1967.

[10] The elements of § 1981, § 1983, and § 1985 discrimination claims being equivalent (except for the § 1983 state action requirement), it makes no difference whether Jatoi's discrimination claim is viewed as a claim under § 1983 as well as under §§ 1981 and 1985.

[11] See page 17, footnote 26, *infra*.

[12] See pages 17-18, footnote 27, *infra*.

[13] He did, however, try to prove that individual hospital administrators and other employees discriminated against Rajendra Gandhi, an Indian radiologist, by breaking an unwritten agreement to grant him a monopoly in the reading of unassigned EEGs. (R-II, pp. 51-55)

tion claims. *Jatoi v. Hurst-Euless-Bedford Hospital Authority, supra.* (App. G, pp. A-17 to A-29; App. H, pp. A-30 to A-32)

Jurisdictional Base in Courts Below

Jatoi alleged jurisdiction in the district court under 28 U.S.C.A. § 1343 (Supp. 1987).[14] The Court of Appeals had jurisdiction on appeal under 28 U.S.C. § 1291 (Supp. 1987).

REASONS RELIED ON FOR ALLOWING THE WRIT

In *Bhandari v. First National Bank of Commerce,* No. 85-3445, Slip Op. 187 (Oct. 5 1987), *reversing on rehearing en banc* 808 F.2d 1082 (1987), the Fifth Circuit holds that citizens of India are not entitled to protection under 42 U.S.C. § 1981 from private discrimination based on alienage. In this case, the Fifth Circuit holds that an American citizen of East Indian descent is entitled to seek relief under § 1981 from what the plaintiff alleges to be discrimination "[b]ecause of his alienage and natural origin, and because his board certification is in England and not the United States. . ." (R-I, pp. 2-3)

Bhandari is based on the proposition that it is "beyond serious dispute that the reasoning of *Jones [Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968)] and *McCrary [Runyon v. McCrary,* 427 U.S. 160 (1976)] cannot stand of its own force." The reasoning attacked, which has also been attacked by at least four members of this Court, is the reasoning underlying this Court's holding that §1981 reaches private discrimination of any kind.

The opinions in *Bhandari* and in this case show that one statute is now being read to have two different meanings when applied to people of the same national origin. The words of § 1981 have one meaning, not two. They are universal: "All persons within the jurisdiction of the

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[14] This not being a suit for damages, the district court did not have jurisdiction under 28 U.S.C. § 1343(a)(1)-(2). Jatoi did not meet the state action requirement of 28 U.S.C. § 1343(a)(3). Jurisdiction under 28 U.S.C. § 1343(a)(4) is not disputed.

United States shall have the right . . . ."

The three opinions in *Bhandari* cry out for this Court to resolve the troubling issues raised therein. This case is a natural complement to *Bhandari* if and when *certiorari* is granted in that case.

Because counsel first received a copy of *Bhandari* while this petition was already in galley, *Bhandari* is not discussed further. There are far more important reasons for granting *certiorari* in this case than having this case serve as a complement to *Bhandari*. Those reasons are set forth below.

State action. The panel held that H-E-B's actions constituted state action even though no governmental entity participated in or enforced the decision to deny reappointment. In so doing, the panel refused to apply recent state action precedents of this Court, including *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982). The panel relied instead on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), despite the absence in this case of the central element of *Burton* — state acquiescence and profit from known policies of racial discrimination.

The panel's holding that *Burton* applies without regard to *Rendell-Baker*, *Lugar*, and *Blum* in cases involving leased government property has serious implications for all lessors, lessees, and private users of government-owned property and directly conflicts with holdings of the Sixth and Eighth Circuits.[15]

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[15] In *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984), the court found no state action in the restriction of a physician's staff privileges. The hospital was subject to extensive regulation and derived substantial revenues from governmental sources. Two public officials served on its Board. The hospital premises had been purchased by a county and "leased back to the Board of Trustees through a financial arrangement authorized by state statute." *Id.*, 740 F.2d at 450.

Employment discrimination. Jatoi's case-in-chief consisted primarily of evidence intended to prove pretext. Although the legitimate, nondiscriminatory reasons for H-E-B's actions were in evidence, the panel reversed because it found Judge Porter's finding on *McDonnell Douglas* prima facie case criteria inadequate. The panel refused to follow *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983) (holding that *McDonnell Douglas* criteria are not relevant after the employer's legitimate, nondiscriminatory reasons have been articulated) and stated that since Judge Porter made no articulation finding, appellate review must proceed *as if articulation had never occurred* (even though articulation had occurred as a matter of law). The panel then circumvented the "clearly erroneous" standard of Rule 52(a) by remanding for further proceedings instead of vacating and remanding for additional findings only.

This case reveals that clarification of the role of *McDonnell Douglas* and articulation findings in cases dismissed under Rule 41(b) is necessary to reduce the frequency of wasteful retrials in cases of this nature.

(footnote 15 continued)

In *Lubin v. Crittenden Hospital Ass'n,* 713 F.2d 414 (8th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984), the court found no state action in disciplinary proceedings against a physician. The hospital in *Lubin* was owned by the county and received funds from local taxes, Medicare, and Medicaid. No public members served on its board. Citing *Blum,* the court held that there can be state action only when it can be said that the state is responsible *for the specific conduct of which the plaintiff complains.*

A Fifth Circuit panel has suggested that *Burton* and *Rendell-Baker* may be irreconcilable.

> . . . [I]f fair attribution is the guiding light of state action through private means, it is difficult to see how the state in *Burton* was any more 'responsible' for the restaurant's decision not to serve blacks than was the state in *Rendell-Baker* for the school's decision to discharge its teachers.

Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278, 1287 (5th Cir. 1985), *modified* 777 F.2d 329 (1985), *cert. denied,* __ U.S. __, 106 S.Ct. 2251, 90 L.Ed.2d 697 (1986).

Methodist Affiliated Hospitals. This entity had nothing to do with the case. The panel reversed the judgment in its favor for no apparent reason.

I.

STATE ACTION

In finding state action, the panel distinguished earlier Fifth Circuit precedents including *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975), and *Madry v. Sorel*, 558 F.2d 303 (5th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), a medical staff privileges case based on *Greco*.

In dissenting from the denial of certiorari in *Greco*, Justice White explained at length why the state action issue presented in *Greco* (and now by this case) should be resolved by this Court. In 1975, there were conflicts between the Circuits on state action issues relating to hospitals which received funding and other financial assistance from governmental entities. More than a decade later, the law is even more unsettled. The Fourth, Fifth, Sixth, and Eighth Circuits have reversed their state action precedents — *in opposite and inconsistent directions.* In this frequently litigated area,[16] more certainty in the law is needed.

In actions under 42 U.S.C. § 1983, the initial inquiry focuses on two elements: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

Jatoi claims that H-E-B denied him procedural due process in denying his application for reappointment. That claim depends upon Jatoi's having had a property right in

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[16] Some of the many hospital state action cases are collected in *Annot.: Action of Private Hospital as State Action under 42 USCS § 1983 or Fourteenth Amendment*, 42 A.L.R. Fed. 463 (1979 and Supp. 1987).

continued membership on H-E-B's medical staff. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). Jatoi had no such right.[17]

The test for determining state action in employee discharge cases is whether the alleged infringement of rights is fairly attributable to the state. *Rendell-Baker, supra*, 457 U.S. at 838, citing *Lugar, supra*, 457 U.S. at 937. In *Rendell-Baker*, a government agency funded programs at a private school but had no right to hire or fire employees paid through the use of its funds. Although the school's income was derived primarily from public sources, the Court held that responsibility for the challenged decision was not fairly attributable to the state. *Id.*, 457 U.S. at 838-39, n. 6.

In this case, as in *Rendell-Baker*, there is no connection between a governmental body and the alleged deprivation of rights. Jatoi complains about purely private actions not initiated, taken, encouraged, enforced, or otherwise attributable to the state.[18]

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[17] Under Texas law, a physician had no right in 1981 to a due process hearing prior to his exclusion from the medical staff of a private hospital. *Grossling v. Ford Memorial Hospital*, 614 F.Supp. 1051, 1058 (E.D. Tex. 1985), and cases cited therein. The rule may have differed with respect to public hospitals and hospitals managed by a public board or governing body appointed by a government entity. *See Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971) and *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (5th Cir. 1971). H-E-B was and is a church-related, private corporation, not a governmental entity. Members of its Medical Board and Board of Trustees hold their offices by private decision, not public election or appointment. Jatoi's rights were those of a member of the medical staff of a private hospital, not a public hospital. Due process in medical staff selection matters is now assured under TEX. REV. CIV. STAT. ANN. art. 4437f, § 17(c) (Vernon Supp. 1987) (effective May 24, 1985). (App. M, p. A-55). H-E-B's procedures comported with due process requirements in any event.

[18] After Jatoi's reappointment was denied, a hospital administrator advised the Authority about that decision. That announcement — the sole link between the Authority and the actions about which Jatoi complains — does not establish state action. The panel thought otherwise. *Jatoi, supra*, 807 F.2d at 1221. (App. G, pp. A-28 to A-29)

In *Burton*, a public parking authority leased space to a private restaurant, acquiesced in the restaurant's open and obvious policy of excluding black patrons, and shared in profits from known racial discrimination. Labeling the relationship between the authority and restaurant a "symbiotic relationship," the Court held that the restaurant's racist actions could be attributed to the authority because the authority had knowingly permitted and willingly profited by those actions.

In *Reitman v. Mulkey*, 387 U.S. 369, 379-80 (1967), the Court explained its holding in *Burton*. The state had placed its power, property, and prestige behind admitted racial discrimination and by its inaction made itself a party to the restaurant's refusal to serve black patrons. Under the circumstances, the discriminatory refusal of service "... could not be considered the purely private choice of the restaurant operator." The issue in *Burton* was not whether the public lessor and private lessee depend upon one another but "whether the State has *significantly involved itself with invidious discriminations.*" *Id.*, 387 U.S. at 380 (emphasis added).

Acquiescing in and receiving profit from known racial discrimination is sufficient involvement to justify a "fair attribution" finding. In *Rendell-Baker*, the Court explained that it was the showing in *Burton* "that the State profited from the restaurant's discriminatory conduct" which justified its conclusion "that the State should be charged with the discriminatory actions." *Rendell-Baker*, *supra*, 457 U.S. at 843.

The summary judgment evidence shows that there was no link between H-E-B's refusal to reappoint Jatoi and any profit or benefit received by the Authority. There is nothing in the record suggesting that H-E-B had discriminatory policies or that the Authority knew about or acquiesced in such policies. The summary judgment evidence proved that the Authority had nothing to do with the refusal to reappoint Jatoi and had no legal right to par-

ticipate in, ratify, or challenge that decision.[19] H-E-B's actions are not fairly attributable to the state.

Recognizing that the Authority had nothing to do with the decision Jatoi challenges, the panel made no effort to construe *Burton* in light of *Rendell-Baker, Lugar,* and *Blum*, and applied *Burton* despite the absence of its central element — state acquiescence in and profit from known policies of racial discrimination.[20] To reach this result, the panel rejected prior Fifth Circuit state action precedents such as *Greco* and *Madry* which do conform to the fair attribution test.

In *Greco,* as in this case, the hospital was financed with public bonds, its land and buildings belonged to a governmental entity, and the premises were leased to a private hospital corporation. The *Greco* panel found no

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[19] The *Jatoi* panel justified its refusal to apply *Rendell-Baker* and *Blum* on the ground that the defendants in those cases operated private facilities receiving public funds whereas the hospital in this case was publically owned and built with state funds. The panel also stated that in *Rendell-Baker* and *Blum* the state did not benefit financially from the private operation of the facility but that in this case hospital revenues were used to pay off the Authority's bond obligations. *Jatoi, supra,* 807 F.2d at 1221. (App. G, p. A-28) The panel did *not* suggest that the Authority knowingly received profits from acts or policies of racial discrimination and implicitly held that profit *from discrimination* is not an important element of *Burton*.

Another Fifth Circuit panel has stated that "Where public and private entities are functionally symbiotic, *any act* of the private entity will be fairly attributable to the state even if it cannot be shown that the government played a direct role in the particular action challenged." *Frazier, supra,* 765 F.2d at 1288, n. 22 (emphasis added). The plaintiff in *Frazier* had been a county employee in a county hospital's respiratory services department until the hospital turned the department over to a private contractor. She was subsequently discharged by the private contractor. Holding that sharing space and performing services under contract with a public hospital are not enough to convert a private employment decision into state action, the *Frazier* panel found no state action only because the hospital's *success* did not depend upon revenues from the private contractor.

[20] The First Circuit also identifies state profit *from discrimination* as the key element in determining the existence of symbiotic relationship. *Ponce v. Basketball Federation,* 760 F.2d 375, 382 (1st Cir. 1985).

state action in the hospital's decision to prevent abortions on its premises.

Having reversed its stance, the Fifth Circuit stands alone in refusing to harmonize *Burton* with this Court's post-*Burton* holdings. Its holding in *Jatoi* conflicts with Sixth and Eighth Circuit holdings in similar medical staff cases involving leased hospital premises.[21]

This Court has never held that discrimination by a private entity violates the Fourteenth Amendment merely because that entity receives some benefit or service from the state. *Moose Lodge v. Irvis*, 407 U.S. 163, 173 (1972). For the same reason, the acts of a private hospital do not constitute state action merely because the hospital leases premises from a governmental body. The inquiry should not be "Is the State the landlord?" or "To what extent is a government lessor financially dependent upon its private lessee?" but ". . . whether there is a sufficiently close nexus between the State *and the challenged action* . . . so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (emphasis added).

In *Blum*, substantial state funding of a private entity's health care programs was found to be ". . . no more persuasive than the fact of regulation of such an entity in demonstrating that the state is responsible for decisions made by the entity in the course of its business." *Blum, supra*, 457 U.S. at 1011. H-E-B's leasing premises from the Authority does not make the state responsible for H-E-B's refusal to reappoint Jatoi.

Equating lessees with managers and implicity holding that public lessors are vicariously liable for wrongful acts of private lessees, the panel proclaimed that

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[21] See pages 7-8, footnote 15, *supra* (discussing *Crowder* and *Lubin*). For cases involving state action in hospitals receiving government financing other than through leasing arrangements, see *Carter v. Norfolk Community Hospital Association, Inc.*, 761 F.2d 970 (4th Cir. 1985) (applying *Blum* and *Rendell-Baker*) and *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023 (4th Cir. 1982).

"The Authority cannot benefit from private management of the hospital and at the same time insulate itself from liability for racial discrimination by that manager." *Jatoi, supra*, 807 F.2d at 1221. (App. G, p. A-29) The panel missed the point. Judge Porter *denied* the summary judgment motion on Jatoi's *discrimination* claims. He granted a summary judgment only with respect to Jatoi's *procedural due process* claim, a claim which could have been raised by any physician without regard to race, color, or national or ethnic origin.

Discrimination victims have sufficient remedies under §§ 1981 and 1985 against public and private actors responsible for discrimination in medical staff selection cases. In such cases, a remedy under § 1983 for alleged discrimination requires proof of the same facts required to prove discrimination under § 1981, the only difference being the additional state action requirement in § 1983 cases. *See Daniels v. Board of Education of Ravenna City School District*, 805 F.2d 203, 207 (6th Cir. 1987); *Irby v. Sullivan*, 737 F.2d 1418, 1429-30 (5th Cir. 1984).

Jatoi alleged due process and discrimination claims under § 1983. As this case illustrates, a § 1983 *due process* claim is needed only when a *discrimination* claim fails. If the plaintiff's § 1981 discrimination claim fails, his § 1983 *discrimination* claim must also fail. Stretching state action boundaries in cases such as this case serves no purpose other than to allow minority plaintiffs *who cannot prove discrimination* to seek relief under due process theories unavailable to nonminority plaintiffs. The result, in practice, of the *Jatoi* decision is to grant minority physicians greater due process rights than nonminority physicians. *Burton* does not compel that result.

The end result of combining *Greco* and *Jatoi* is that state action will be found in the name of preventing discrimination only when a state action finding is not necessary to remedy discrimination. When federally protected rights unrelated to discrimination are involved,

as in *Greco,* state action will not be found even though no federal remedy exists without a state action finding. In discrimination cases in which there are adequate remedies under other federal statutes, state action will be found even when discrimination is not proved. This kind of backwards logic should not be allowed to stand.

When *Burton* was decided, this Court had not yet held that discrimination suits under 42 U.S.C. § 1981 or 1982 could be maintained against private actors.[22] Doubts about the applicability of civil rights laws to acts of private discrimination[23] led the Court to fashion a "symbiotic relationship" test which stretched the state action concept to its outer limits. The driving force behind *Burton* and the sole source of its persuasive power is the argument that it is *fair* to attribute to the state responsibility for racial discrimination if the state *knowingly and willingly* supports and profits from the *discriminatory acts or policies* of private actors using state-owned propery.

The "symbiotic relationship" test yields conflicting

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[22] *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 was intended to bar private as well as public racial discrimination in the sale or rental of property); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973) (equating the provisions of §§ 1981 and 1982); and *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975) (holding that § 1981 affords a federal remedy against discrimination in private employment on the basis of race). *See also Runyon v. McCrary*, 427 U.S. 160 (1976).

[23] Before *Burton*, no recognized basis existed for attacking private discrimination on public property. In *Jones v. Alfred H. Mayer Co., supra*, Justice Harlan, joined by Justice White, argued that the language, structure, and legislative history of the 1866 Civil Rights Act showed that the Court's thesis that the Act was meant to apply to purely private action "is open to the most serious doubt, if indeed it does not render that thesis wholly untenable." *Id.*, 392 U.S. at 473. *See also Runyon v. McCrary*, 427 U.S. at 192-214 (White, J., with Rehnquist, J., dissenting); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976) (White, J., with Rehnquist, J., dissenting).

results and has never been workable.[24] In employment discrimination and other cases actionable under § 1981 and other statutes, an expansive interpretation of *Burton* is unnecessary and serves only to protect litigants who are not victims of discrimination. The "symbiotic relationship" test is not needed in its present form to combat acts of private discrimination.

It is time for the Court to reevaluate *Burton* in the light of *Rendell-Baker, Lugar,* and *Blum* and to redefine the scope of *Burton's* application. Petitioners urge the Court to grant certiorari to settle the conflict between the Circuits in this important area of the law.

II.

DISCRIMINATION CLAIMS: SUFFICIENCY OF THE FINDINGS

Jatoi's case was an attempt to establish pretext, not the existence of *McDonnell Douglas* criteria. At trial, Jatoi presented no evidence that he was employed by H-E-B, that H-E-B replaced him with a nonminority, or that H-E-B was accepting new medical staff members with his qualifications.[25] He focused on one contention: that H-E-B's articulated reasons for refusing to reappoint him — failure to meet acceptable practice standards and failure to comply with hospital bylaws relating to medical records

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[24] Complaining that the majority opinion in *Burton* did not provide sufficient guidance in delineating the boundaries of state action, Justice Harlan stated that he could not determine "just what it is in the record that satisfies the requirement of 'state action.'" *Burton, supra,* 365 U.S. at 728.

[25] With respect to qualifications, Jatoi pleaded that he was discriminated against because of his English board certification in general surgery. At trial, he admitted that his training abroad was different from training received in the United States and refused to state that his surgical training was as rigorous as that received by surgeons in the United States. (R-II, pp. 5-7) His brief submitted to the Medical Board attacking the hospital's decision to require American board certification as a condition for obtaining trauma privileges was admitted into evidence. (PX-19)

— were not the real reasons for H-E-B's actions.[26]

To prove pretext, Jatoi tried to discredit members of the Medical Board by showing that the reasons given for their actions were false and that their true motivations were financial, racial, and personal.[27]

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[26] The Defendants' articulation burden was met through the admission of evidence documenting the hospital's reasons for its actions. Jatoi placed in evidence a summary of problem cases reviewed by Medical Staff committees as part of H-E-B's peer review process (PX-18) and the 323-page transcript of the September 17, 1981, Medical Board meeting (PX-17) in which Jatoi addressed the issues raised by those summaries, including questions about his care of patients and failure to comply with medical records requirements. Jatoi also placed in evidence correspondence advising against his reappointment because of "a consistent trend of your failure to adequately document patient care" and because "[r]eviews by various Committees and the Department of Surgery reveal that your standard of care does not meet acceptable practice standards in this community." (PX-8) Much of the 323-page transcript of the Medical Board meeting consists of Jatoi's defense of his admitted failure to comply with medical records requirements. Jatoi argued that poor record keeping is no problem as long as patients receive adequate care. (PX-17)

[27] Dr. Railsback, who presided at the Medical Board meeting on September 17, 1981, had objected to Jataoi's performance of surgery in Railsback's area of specialty. (R-II, pp. 86-89) Dr. Alldredge allegedly made a slur against foreign doctors to Pearl Green, one of Jatoi's patients. (R-II, p. 68) Dr. Hyde rarely talked to Jatoi but allegedly once told him that "we have to protect our surgeons"or "we have got to protect ourselves." (R-II, p. 86) Dr. Lewis was ostensibly guilty of discrimination by virtue of his association with Dr. Turner. (R-II, p. 91) Dr. Marling, a former Chief of Staff, allegedly failed to take appropriate disciplinary action against a physician who apologized to Jatoi after performing surgery on one of Jatoi's patients when Jatoi was available. (R-II, pp. 83-84; 86) Dr. Lalani, a Medical Board member of Indian origin, had to give up an East Indian partner so that he could have an Anglo-Saxon partner, according to Jatoi. (R-II, pp. 121-22) Dr. Karper, according to Jatoi, gave the appearance of having hatred or contempt for him. (R-II, pp. 91-91) Nothing negative was said about the other five members of the Medical Board.

Jatoi also testified that a hospital administrator informed him in 1975 or 1976 that bigotry motivated Dr. Turner, a former chief of H-E-B's medical staff, in his attempt to restrict Jatoi's privileges. (R-II, pp. 21-22) Jatoi inferred that Turner wanted to give Jatoi's business to

The entire trial was a trial on the issue of pretext and that issue was fully tried. After Jatoi rested, the defense moved for dismissal under Rule 41(b). Jatoi's counsel responded that Jatoi ". . . has shown himself by his testimony and that of his peers to not have violated any standards sufficient to require his removal . . . . " (R-II, p. 156) He then argued pretext — that improper motives led to the challenged decision.[28] Jatoi's counsel did not ask for an additional opportunity to show pretext. He merely requested that the Defendants rebut the evidence of pretext he had already presented.

Once the defendant's legitimate, nondiscriminatory reasons for its actions are in evidence in an employment discrimination case, the *McDonnell Douglas* criteria for establishing a prima facie case become irrelevant. *U. S. Postal Service Board of Governors v. Aikens, supra,* 460 U.S. at 715.[29] This Court has instructed trial courts not to

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(footnote 27 continued)

Dr. Steven Weinberg, a white surgeon. (R-II, pp. 16-17) Turner was not a member of the Medical Board which recommended against Jatoi's reappointment.

[28] Jatoi's counsel concluded his argument with the following statement:

> I think that his membership in the protected class kind of heightens, if you will, the differentiation that might have been made for financial motives. In other words, by virtue of his being in that class and being in financial conflict and then treating him differently, kind of like big fish eating little fish, he was more likely to be stepped on because of the feeling he'd be less likely to fight back. And so we feel like all those motives kind of combined to show discrimination. I think the law recognizes that. We feel like there's sufficient evidence to require rebuttal by the defense. (R-II, pp. 156-57)

[29] The allocation of burdens and order of presenting proof are set forth in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The *McDonnell Douglas* criteria are not to be applied mechanically and should only be applied in cases in which application of the criteria is a sensible, orderly way of evaluating the evidence in the light of common experience as it bears on the discrimination issue. *Furnco Construction*

make their inquiry more difficult by making findings on the *McDonnell Douglas* criteria after the articulation at trial of the defendant's legitimate, nondiscriminatory reasons for its actions. *Id.*, 460 U.S. at 716. If articulation occurs during the plaintiff's case, the court may entertain and grant a Rule 41(b) motion on the entire case if the plaintiff had an opportunity to show pretext before resting. *Mitchell v. Baldridge*, 759 F.2d 80, 83 (D.C. Cir. 1985).[30]

In this case, the legitimate, nondiscriminatory reasons for the denial of Jatoi's application were in evidence. Jatoi had notice of those reasons. He tried to rebut those reasons by presenting evidence that the reasons given were not the real reasons for the treatment he received. Having exercised his opportunity to prove pretext, Jatoi failed to persuade Judge Porter that the reasons given by the Defendants were pretextual.

On appeal, the panel agreed with Judge Porter that Jatoi had failed to prove discrimination by direct evidence. That holding is equivalent to a holding that Jatoi failed to rebut persuasively the articulated reasons for the Defendants' conduct. Jatoi's attempt at rebuttal consisted of evidence intended to prove discrimination *by direct evidence of allegedly improper motivations* of individual members of the Medical Board.[31] The panel, however,

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(footnote 29 continued)

Corp. v. Waters, 438 U.S. 567, 577 (1978).

Hospitals engaging in federally mandated peer review and periodic reevaluation of staff members are not analogous to other employers. Common sense does not dictate that *any* refusal to reappoint a minority physician to a hospital medical staff gives rise to an automatic presumption of discrimination. Such a presumption would put a chilling effect on peer review.

[30] *See also Alires v. Amoco Production Co.*, 774 F.2d 409 (10th Cir. 1985); *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346-47, n. 3 (5th Cir. 1985); *Ekanem v. Health and Hospital Corp.*, 724 F.2d 563, 568 (7th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984); and cases cited therein.

[31] Jatoi offered no statistical or other circumstantial evidence.

refused to review Judge Porter's decision, holding that his findings with respect to *McDonnell Douglas* prima facie case criteria were "too incomplete" to affirm.

This Court has long held that proper findings of fact and conclusions of law are an essential element in the appellate process.[32]

In *Aikens*, the Court criticized the parties and the Court of Appeals for dwelling on issues relating to the making of a prima facie case after articulation of the employer's legitimate, nondiscriminatory reasons for its actions. *Id.*, 460 U.S. at 714. Stating that the parties and courts below should have dealt only with the ultimate issue — discrimination *vel non* — the Court held that the district court, at the close of the evidence, should have proceeded to decide the ultimate question: whether the defendant intentionally discriminated against the plaintiff. *Id.*, 460 U.S. at 715.

Judge Porter has been reversed because he followed this Court's command and decided the ultimate issue: intentional discrimination *vel non*. In 14 findings of fact, Judge Porter summarized the testimony favorable to Jatoi. (App. F, pp. A-13 to A-15) He then explained the basis for

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[32] In *Kelley v. Everglades Drainage District*, 319 U.S. 415 (1943), the Court refused to search the record and supply findings which the trial court failed to make. The ultimate issue was fairness and required the fact finder to consider and weigh numerous fairness factors. Meaningful appellate review could not proceed because the Court could not determine what factors the trial court considered or the weight assigned to them. The Court resisted the temptation to substitute its opinion on fairness for that of the trial court on the basis of the record. *See also Commissioner v. Duberstein*, 363 U.S. 278 (1960) (appellate courts may vacate and remand if the findings do not provide an indication of the legal standard with which the trier of fact has approached his task even if the evidence is adequate to support a judgment).

On the other hand, appellate courts should not be burdened with unnecessary findings. "As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach." *Immigration and Naturalization Service v. Bagamasbad*, 429 U.S. 24, 25 (1976). *See also Dalehite v. United States*, 346 U.S. 15, 24, n. 8 (1953) (condemning "profuse, prolific and sweeping" findings).

his decision.

In his third conclusion of law, Judge Porter stated that Jatoi's evidence added up to no evidence that considerations based on national origin were factors in the decision to deny Jatoi's reappointment or that discriminatory reasons more likely motivated the Defendants than not. Recognizing that intentional discrimination may be shown by circumstantial evidence utilizing *McDonnell Douglas* criteria, Judge Porter stated the unmistakable basis for his decision: his conclusion that Jatoi's explanation of the Defendants' motives was unpersuasive. As Judge Porter stated: "At best, plaintiff's evidence establishes only that Plaintiff and one other member of his racial and national origin group *felt* they were the victims of discrimination." He then held that conclusory feelings are insufficient evidence of discrimination to make out a prima facie case under § 1981. (App. F, pp. A-15 to A-16)

In employment discrimination cases, there are two kinds of prima facie cases: the prima facie case in the *McDonnell Douglas* sense and the prima facie case required to withstand a Rule 41(b) motion as in civil cases generally. Under Rule 41(b), the court after hearing and weighing the evidence may dismiss a claim after the plaintiff rests if persuaded that the plaintiff has shown no right to relief — that is, that he has failed to establish a prima facie case sufficient to require additional evidence from the defendant.

The use of "prima facie case" terminology is inherently confusing in employment discrimination cases dismissed under Rule 41(b). In granting the Defendants' Rule 41(b) motion, Judge Porter used that terminology, orally announcing that because no prima facie case had been made, "I don't think the burden of going forward has — would shift to the defendant *under Rule 41(b).* " (App. E, p. A-10) (emphasis added). The *Jatoi* panel held that "To the extent the district court may have held that Dr. Jatoi did not establish a prima facie case through direct evidence, it was correct." *Jatoi, supra,* 807 F.2d at 1220. (App. G, p. A-25) The panel then stated that it could not

ascertain how Judge Porter had concluded that Jatoi had failed to make a prima facie case through circumstantial evidence utilizing the *McDonnell Douglas* criteria, ignoring the concept of a prima facie case under Rule 41(b).

Because the articulation burden had been satisfied before Jatoi rested, there was no necessity that Judge Porter make findings on the *McDonnell Douglas* criteria. The panel, however, held that the articulation burden will not be treated as met unless the district court makes a finding that the burden has been met. *Id.*, 807 F.2d at 1220. (App. G, pp. A-25 to A-26) In the absence of an articulation finding, the panel felt that appellate review must proceed *as if articulation had never occurred.* This is a gross misperception of the articulation burden.

Articulation is a step involved in the basic allocation of burdens and the order and presentation of proof. Articulation is *not* an element of either party's case. Articulation findings are no more required than are *McDonnell Douglas* findings. A trial judge need not make findings on an issue if other issues are decisive of the case. *Fields Engineering & Equipment, Inc. v. Cargill, Inc.*, 651 F.2d 589, 594 (8th Cir. 1981).

When the facts are undisputed, though no finding is made, the case need not be remanded. *Yanish v. Barber*, 232 F.2d 939, 947 (9th Cir. 1956). In this case, the content of the trial record is not in dispute. Satisfaction of the articulation burden can be readily ascertained as a matter of law from the record. The Court of Appeals did not need a finding from the trial court to figure out how far along the parties had gone in the presentation of proof.

Even if Judge Porter's findings and conclusions are not perfect, the absence of perfection does not preclude appellate review and compel a wasteful remand for additional findings or retrial. The failure of a trial judge in a non-jury action to comply with Rule 52(a) does not require a remand or impel reversal of a correct judgment if a complete understanding of the issues is possible and there is sufficient basis for the appellate court's consideration of the

merits of the case. *Caterino v. United States*, 794 F.2d 1, 6-7, n. 2 (1st Cir. 1986), *cert. denied*, ____U.S.____, 107 S.Ct. 1347, 94 L.Ed.2d 518 (1987), citing *Gulf Towing Co., Inc. v. The Steam Tanker, Amoco New York*, 648 F.2d 242, 245 (5th Cir. 1981).

The purpose of requiring the trial court to state the facts specifically is to aid the appellate court in its review and to aid the trial judge in the adjudicative process. Merely indicating the factual basis for the ultimate conclusion will suffice in most cases. *United States v. Birnbach*, 400 F.2d 378, 382 (8th Cir. 1968). The ultimate test is whether the findings are sufficiently comprehensive to provide a basis for decision and supported by the evidence. *Maher v. Hendrickson*, 188 F.2d 700, 702 (7th Cir. 1951).

Judge Porter summarized the evidence and stated his conclusion that the evidence established only one thing: that Jatoi and one other member of his racial and national origin group *felt* that they were victims of discrimination. The evidence did not persuade Judge Porter that considerations based on national origin were factors in the decision to deny Jatoi's reappointment or that the Defendants were more likely than not motivated by discriminatory reasons. This case should not be remanded under the theory that the findings and conclusions of the trial court were too incomplete to permit meaningful appellate review. There is no secret about what Judge Porter did or about the factual and legal basis underlying his decision. Rule 52(a) should be applied sensibly, not as if it were a law of the Medes and Persians. *Urbain v. Knapp Brothers Manufacturing Co.*, 217 F.2d 810, 816 (6th Cir. 1954), *cert. denied*, 349 U.S. 930 (1955).

In *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985), an employment discrimination case, the employer's legitimate, nondiscriminatory reasons for its actions were in evidence. The plaintiff had full opportunity to show that the employer's stated reasons for its actions were pretextual. The district court ruled in the employer's favor. Affirming, the panel held that the

district judge's only error was to mislabel his ultimate finding that the employee was not subjectively qualified for promotion as a finding of "no prima facie case" instead of "no pretext." The same rationale should apply in this case. The record reveals that Judge Porter was not satisfied with Jatoi's evidence of pretext, felt that Jatoi's evidence showed nothing more than Jatoi's subjective feeling that he was a victim of discrimination, and felt that Jatoi's evidence was insufficient to necessitate further response by the Defendants.

Even if Judge Porter's findings are inadequate, remand is unnecessary. Although inadequate findings and conclusions may be remanded to a district court for supplementation, remand for more specific findings should not occur if doing so will consume precious time and judicial resources without serving any purpose. *Withrow v. Larkin*, 421 U.S. 35, 44-45 (1975). *See also McCord v. Bailey*, 636 F.2d 606, 613 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

If a remand is necessary, that remand should be a limited remand for further findings only. The proper procedure is to vacate the judgment and remand the case for further findings and conclusions on the basis of the evidence already before the trial court. *See United States Postal Service Board of Governors v. Aikens, supra*, 460 U.S. at 717.[33] Remand for further findings is the remedy

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[33] *See also Interstate Circuit v. U.S.* 304 U.S. 55 (1938); *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U.S. 67 (1933); *Railroad Commission of Wisconsin v. Maxcy*, 281 U.S. 82(1930).

ordinarily prescribed by the Fifth Circuit in employment discrimination cases when the findings are deemed inadequate.[34]

In this case, the panel reversed and remanded for further proceedings. If the panel intended a remand for a new trial, the remand for new trial would serve no purpose other than to allow reversal on evidentiary grounds without applying the "clearly erroneous" test. That result should not be sanctioned.

Given the volume of employment discrimination cases and the continued confusion in the Fifth Circuit over the role of the articulation burden,[35] clarification by this Court of its prior holding in *Aikens* is essential. Petitioners urge this Court to grant certiorari and spell out the requirements for findings in employment discrimination cases dismissed under Rule 41(b).

III

Methodist Affiliated Hospitals

In his complaint, Jatoi named Methodist Affiliated Hospitals as the lessee of the hospital premises. The summary judgment evidence proved that H-E-B was the lessee and that Methodist Affiliated Hospitals had nothing to do with this case. Methodist Affiliated Hospitals was not mentioned at trial. There is no basis for reversal of the judgment in favor of Methodist Affiliated Hospitals.

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[34] *See, e.g., Lopez v. Current Director of Texas Economic Development Commission*, 807 F.2d 430, 435 (5th Cir. 1987) (decided one week before the case at bar).

[35] *See Burdine v. Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), rev'd *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Methodist Affiliated Hospitals urges the Court to grant certiorari and affirm the district court's judgment in its favor.

CONCLUSION

For the reasons set forth above, Petitioners pray that this Petition for a Writ of Certiorari be granted, that the Court of Appeals be reversed, and that the District Court be affirmed.

Respectfully submitted,

Tom Renfro, Counsel of Record

William M. Schur, Of Counsel

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

On this 13th day of November, 1987, a copy of the foregoing Petition for a Writ of Certiorari was served on counsel for Respondent A.M. Jatoi, M.D., by mailing same by United States Mail, properly addressed, first class postage prepaid, certified, return receipt requested, to Mr. Art Brender, 930 Capital National Bank Building, 110 W. 7th Street, Fort Worth, Texas 76102.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed
OCT 24 1984

DR. A.M. JATOI	)	
	)	
VS.	)	No.
	)	CA3-81-2013-F
HURST-EULESS-BEDFORD	)	
HOSPITAL AUTHORITY, ET AL.	)	

ORDER

This cause is before the Court on defendants' motion to dismiss. Plaintiff's application for reappointment to the medical staff of the Hurst-Euless-Bedford Hospital was denied on May 7, 1981 based on allegations of medical misconduct by plaintiff. Plaintiff bases jurisdiction on 28 U.S.C. §§ 1343, 1981, 1983 and 1985 and alleges that his termination from the medical staff was accomplished without procedural safeguards by the Fourteenth Amendment and because of his national origin. Defendant argues in its motion to dismiss that this Court does not have jurisdiction because there was not "state action." Having considered the briefs of counsel and the authorities cited therein, the Court concludes that the essential element of "state action" is absent from this case, and that the Court, therefore, has no jurisdiction.

In order for the Hospital's termination of Dr. Jatoi to be classified as "state action" there must be a sufficiently close nexus between the challenged action and the state's regulation so that the action of the former may be fairly treated as that of the state itself. *Jackson v.*

Metropolitan Edison Co., 419 U.S. 345, 351, 42 L.Ed 2d 477 (1974). The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which plaintiff complains. *Blum v. Yaertsky,*[*sic*] 457 U.S. 991, 1004, 73 L.Ed 2d 534 (1982). If the Hospital's action was a purely private one, then sections 1983 and 1985 afford no basis for federal jurisdiction. *Lubin v. Crittenden Hospital Ass'n*, 713 F.2d 414, 415 (8th Cir. 1983).

The Hurst-Euless-Bedford Hospital Authority was formed pursuant to Texas law to construct and operate a health care facility. The Authority, however, had difficulty operating the facility, and in early 1974 an arrangement was made with Harris Hospital Methodist, a private hospital in Fort Worth, to assume operation of the facility. The Board of Directors of the Hurst-Euless-Bedford Hospital is selected by the Board of Trustees of Harris Hospital. The Hospital Authority has no say in the running of the hospital or in the decisions of the Hospital. The sole relationship is that the Hospital Authority is lessor of the premises to the Hurst-Euless-Bedford Hospital.

This case is controlled by the decision in *Madry v. Sorel*, 558 F.2d 303 (5th Cir. 1977). In *Madry*, the hospital was constructed and maintained with county funds. The Court of Appeals held that the fact that the hospital received a substantial amount of government funding was not sufficient to subject the acts of the hospital to the restraints of the Fourteenth Amendment. In this case, the Hurst-Euless-Bedford Hospital is independent of state control, and the mere fact that the Hospital receives governmental funding and leases the facility from the Hospital Authority is insufficient to establish the requirement of state action. Since there is no state action in this case, the plaintiff's claim must be dismissed.

So ORDERED this 24 day of October, 1984.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed
DEC 7 1984

DR. A.M. JATOI	)	
	)	
VS.	)	No.
	)	CA3-81-2013-F
HURST-EULESS-BEDFORD	)	
HOSPITAL AUTHORITY, ET AL.	)	

ORDER

This cause is before the Court on Plaintiff's motion to reconsider order or in the alternative for new trial. The court has previously determined that Plaintiff failed to state a claim for violation of his procedural due process rights. The evidence before the Court at this point does not raise a factual issue regarding the existence of state action, however, I have determined that the motion should have been treated as a motion for summary judgment and that Plaintiff should have had an opportunity to present evidence of state action sufficient to breathe life into his claims of denial of procedural due process. Furthermore, the Court erred in dismissing the case without considering the viability of Plaintiff's claims of discrimination based on 42 U.S.C. §§ 1981 and 1985. Plaintiff's complaint states a cause of action under these sections sufficient to withstand a motion to dismiss. *See Coleman v. Franklin Parish School Bd.*, 702 F.2d 74, 77 (5th Cir. 1983); *Carillo v. Illinois Bell Tel. Co.*, 538 F.Supp. 793 (D.C.Ill. 1982). Whether there is evidence to support these claims is a matter to be resolved by motion for summary judgment. It is therefore

ORDERED that the order and judgment dismissing this case be and and hereby are vacated. Defendants' motion to dismiss for lack of state action will be treated as a motion for summary judgment, and Plaintiff is directed to submit evidence to support his claim of state action within 30 days of the date of this order. Defendants, if they so choose, may move for summary judgment on Plaintiff's claims under §§ 1981 and 1985 within 30 days of the date of this order.

Signed and entered this 7th day of December, 1984.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed
JUN 19 1985

DR. A.M. JATOI	)	
	)	
VS.	)	No.
	)	CA3-81-2013-F
HURST-EULESS-BEDFORD	)	
HOSPITAL AUTHORITY, ET AL.	)	

ORDER

This cause is before the Court on Defendants' motion for summary judgment. The two issues which must be resolved are (1) whether a cause of action for discrimination on the basis of national origin may be brought under 42 USC § 1981; and (2) whether the Defendant's termination of Plaintiff's staff privileges at the HEB Hospital constitutes "state action" so as to invoke the requirements of procedural due process. By order of October 24, 1984, the Court granted the Defendants' motion to dismiss based on the absence of state action. Subsequently, the Court determined that the motion to dismiss should have been construed as a motion for summary judgment and that Plaintiff should have been given an opportunity to present evidence in opposition to the motion. The Court therefore vacated the October 24 order and gave Plaintiff the opportunity to present evidence of state action.

After careful consideration, the Court concludes discrimination on the basis of national origin may, under certain circumstances, be a basis for a claim under § 1981. In some contexts, national origin discrimination is so

closely related to racial discrimination as to be indistinguishable. *Spieses v. C. Ation & Co.*, 408 F.Supp.916, 928 n.17 (S.D. Tex. 1975). In order to state a proper claim under §1981, however, the Plaintiff must allege that he was subjected to discrimination because of his race. *Olivares v. Martin*, 555 F.2d 1192 (5th Cir. 1977) citing *Riley v. Adirondack School for Girls*, 541 F.2d 1124 (5th Cir. 1976) (en banc). The Courts confronted with the question whether national origin discrimination can serve as the basis for an action under §1981 have approached the problem on a realistic basis. They have observed that certain groups who are traditional victims of group discrimination have often been subjected to racial identification as non-white. "There is accordingly both a practical need and a logical reason to extend §1981's proscription against racial discrimination to those groups of potential discriminatees." *Budiensky v. Corning Glass Works*, 425 F.Supp 786, 788 (W.D.Pa. 1977). Because East Indians are frequently identified as "non-whites,"§1981's protection extends to them. *Banker v. Time Chemical, Inc.*, 579 F.Supp 1183, 1186 (N.D.Ill. 1983) (listing cases allowing §1981 actions to be brought by East Indians).

Plaintiff in this case, by claiming his Pakistani descent, has sufficiently alleged a non-white racial identification to state a cause of action under §1981. Furthermore, this Court will grant summary judgment "only when the moving party has established his right to judgment with such clarity that the nonmoving party cannot recover...under any discernable circumstances." *Everhart v. Drake Management, Inc.*, 627 F.2d 686, 690 (5th Cir. 1980). Particular caution must be exercised where questions of intent are involved. The Court concludes that the motion for summary judgment on Plaintiff's § 1981 claims should be denied.

The Court has considered the additional evidence

adduced by the Plaintiff regarding his allegations of state action and has concluded there is no state action in this case. For the reasons set forth in the Court's order of October 24, 1984, therefore, summary judgment will be granted on Plaintiff's procedural due process claims under §1983.

For the foregoing reasons, it is ORDERED that Defendant's motion for summary judgment is GRANTED in part and DENIED in part.

Signed and entered this 19th day of June, 1985.

/s/ Illegible

ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed
OCT 31 1985

DR. A.M. JATOI	*	
	*	
VS.	*	No.
	*	CA3-81-2013-F
HURST-EULESS-BEDFORD	*	
HOSPITAL AUTHORITY, ET AL.	*	

JUDGMENT

This case was tried to the Court on October 15 and 16, 1985. Defendants moved for a directed verdict at the close of Plaintiff's case. The Court, finding that Defendants' motion was well taken in that Plaintiff had failed to establish a *prima facie* case of race or national origin discrimination under 42 U.S.C. §1981, granted the motion and entered a verdict for Defendants. The Court's Findings of Fact and Conclusions of Law have been set out in a separate order.

Judgment is hereby entered on behalf of the Defandants in this case, the costs of litigation to be borne by the parties respectively.

SO ORDERED this 31st day of October, 1985.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

APPENDIX B

No. CA3-81-2013F

In The United States District Court
For the Northern District of Texas
Dallas Division

ORAL ANNOUNCEMENT OF DECISION
OCT. 16, 1985
Hon. Robert W. Porter, Judge Presiding

THE COURT: Well, the claim is a 1981 claim of national origin discrimination. And of course, there's no question that Doctor Jatoi is of the east Indian or Semitic race. I really feel that there's been no prima facie case of discrimination. The cases are clear — the only — the only testimony is the perception in his own mind that Doctor Jatoi testified to. And I believe that Doctor Weinberg testified he might have had a feeling, but that's — that is not — there are no specific — the testimony and the other evidence does not show any specific acts or statements that would establish a national origin discrimination. There simply isn't any. And if I — the cases are clear that the mere conclusionary feeling of an individual, his innate feelings that he's been discriminated because of his race or sex or age isn't sufficient to prove a prima facie case. You have to have more than a subjective — you have to have objective evidence. And I don't think that a prima facie case has been made, so that I don't think the burden of going forward has — would shift to the defendant under Rule 41(b). I think it's clear that the law and facts are with the defendant and I'll so hold. I'll supplement these statements from the bench with findings and conclusions which is the better practice and which the Rule contemplates.

But in view of that, I don't think that it makes any difference whether — if I consider all the due process evidence. I think that claim has been summary judged and I think those exhibits and, for example, the last testimony given by Doctor Jatoi and also the references to the hearing have already been summary judged. But for purposes of the record, I'll admit all of the evidence because I've

looked at it and I've listened to it and I don't think it's sufficient to make a prima facie case. And in view of that, that moots the motion for the appointment of a master because that obviously, in my view anyway, goes to the due process claim and not to the discrimination claim.

And I don't have any doubt in my mind about Doctor Jatoi's sincerity. But under the Rule it's my duty to weigh the evidence and I have. And it simply does not amount to a prima facie case and I'll so rule. So I'll get findings and conclusions prepared. I have — there have been findings and conclusions proposed and I'll consider those and then, as I always do, prepare my own.

Well, we'll stand recessed.

(End of proceedings, 10:35 A.M.)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed
OCT 31 1985

DR. A.M. JATOI	)	
	)	
VS.	)	No.
	)	CA3-81-2013-F
HURST-EULESS-BEDFORD	)	
HOSPITAL AUTHORITY, ET AL.	)	

FINDINGS AND CONCLUSIONS

In this case, Plaintiff Dr. A. M. Jatoi claims against the Defendants under 42 U.S.C. §1981 for race and national origin discrimination. Specifically, Plaintiff claims that the denial of his hospital staff privileges at Hurst-Euless-Bedford Hospital (hereinafter "H-E-B Hospital") was discriminatorily based on his race and national origin. Trial to the Court began on October 15, 1985, and at the close of Plaintiff's case on October 16, 1985, Defendant's attorney moved for judgment pursuant to F.R.Civ.P. 41(b). Having heard the evidence presented by Plaintiff's case-in-chief, the Court thereby granted Defendants' motion, finding that Plaintiff failed to make out a *prima facie* case of race or national origin discrimination. These findings of fact and conclusions of law are entered pursuant to F.R.Civ.P. 52(a), and they bear out the conclusion that a Defendants' was warranted by the evidence. The Court's factual findings are in addition to those facts to which the parties have stipulated in the pretrial order filed in this case and are incorporated herein.

Any finding of fact that are deemed to be conclusions

of law or conclusions of law that are deemed to be findings of fact should be deemed the other, as appropriate.

FINDINGS OF FACT

1. Plaintiff is of the semitic race and of East Indian national origin.

2. After Dr. Turner became Chief of Staff at H-E-B Hospital, Dr. Jatoi felt that his previously good relationship with the hospital board began to erode.

3. Dr. Jatoi felt this erosion stemmed from racial animus on the part of Dr. Turner and other medical staff members.

4. Dr. Jatoi was not accepted for membership in the Tarrant County Medical Society and he felt this also was the result of racial and national origin bias.

5. Pearl Green, a patient of Dr. Jatoi's, testified that Dr. Barry Aldridge, a caucasian, told her, after she had been treated by Dr. Jatoi and several other doctors of the Plaintiff's race and national origin, that, "I guess I will have to get you an American doctor who can do something for you".

6. Dr. Jatoi felt that racial and national origin bias on the part of the members of the H-E-B Hospital Board resulted in his not being appointed to staff committees, transfer of his patients to other doctors without his consent, and a general tendency on the part of board members to distance themselves from him in the work place.

7. Dr. Jatoi's medical training in India and England was such that he was able to perform at H-E-B Hospital two block dissections of the neck for carcinoma of the

tongue which encroached on the ear, nose and throat practice of Dr. Dennis Railsback, chief of staff when Dr. Jatoi's staff privileges were terminated.

8. The medical board which recommended that Dr. Jatoi not be reappointed to the hospital staff was comprised of the elected chief doctors from each hospital department, and at least one of these doctors was of the same racial and origin as Plaintiff.

9. Dr. Jatoi has no personal knowledge of any statement or actions against him by H-E-B Hospital doctors based on race or national origin. His belief that he has been discriminated against for his race or national origin is based on the attitudes he perceived others to have toward him.

10. No caucasian doctors were brought up for review by the H-E-B Hospital Board or were suspended as Dr. Jatoi was.

11. Dr. Rajendra Gandhi recently requested that his privileges at H-E-B Hospital be reduced from full "staff" to "courtesy" because he feels that persons of his race and national origin are discriminated against by the H-E-B administration. Dr. Gandhi is of the same racial and national origin as Dr. Jatoi.

12. Dr. John Baugh, who was at one time chief of staff at H-E-B Hospital, and has been on the staff there since 1972, has both assisted and been assisted by Dr. Jatoi during surgical procedures. He has found Dr. Jatoi to have been "excellent" and his care and concern for patients to have been "very good".

13. Specialists in particular areas of practice may have had an economic basis for opposing Dr. Jatoi's reappointment, because Dr. Jatoi's surgery at times

encroached on their areas of specialty.

14. Dr. Steve Weinberg, a surgeon, has been on the medical staff of H-E-B Hospital since 1974, and served one year on the H-E-B Hospital Board. He knows of no reason why Dr. Jatoi should not have been reappointed to the hospital staff, and feels that race or national origin discrimination may have been a partial motivation.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action. Venue is proper in this district and division. All conditions precedent to the maintenance of this action have been fulfilled.

2. Dr. Jatoi is a member of a racial and national origin group which is protected by 42 U.S.C. §1981.

3. Establishment of a *prima facie* case under §1981 requires that Plaintiff produce some evidence of intentional discrimination or disparate treatment based on his national origin. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See also, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Plaintiff introduced no evidence that considerations based on national origin were factors in the decision to terminate his hospital staff privileges, *Furnco Construction v. Waters*, 438 U.S. 567, 575 (1978) or that discriminatory reasons more likely motivated Defendant than not. *Irby v. Sullivan*, 737 F.2d 1418, 1426 (5th Cir. 1984). To prove a claim under §1981, a Plaintiff must prove he was intentionally discriminated against on account of his race. *General Building Contractors Assoc. v. Pennsylvania*, 458 U.S. 373, 391 (1982). Such intentional discrimination may either be shown by direct or circumstantial evidence but utilizes the *McDonnell Douglas* criteria. *Chaline v. KCOH, Inc.*, 693 F.2d 477, 479

(5th Cir. 1982). At best, Plaintiff's evidence establishes only that Plaintiff and one other member of his racial and national origin group *felt* they were the victims of discrimination. Conclusory feelings are insufficient evidence of discrimination to make out a prima facie case under §1981. *Cf. Elliot v. Group Medical & Surgical Serices,* 714 F.2d 556, 566 (5th Cir. 1983) (subjective feelings were insufficient to sustain Plaintiff's burden in age discrimination case).

4. Although Plaintiff did not carry the burden of showing a *prima facie* case of discrimination, the Court finds the action was not frivolous. Therefore each party shall bear their own costs of litigation.

Signed and entered this 31st day of October, 1985.

/s/ Illegible

ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

APPENDIX G

A.M.JATOI, MD, Plaintiff-Appellant,

v.

HURST-EULESS-BEDFORD HOSPITAL AUTHORITY, et al., Defendants-Appellees.

No. 85-1745.

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1987.

Physician, who was not reappointed to medical staff, brought civil rights action alleging discrimination on basis of national origin and alienage and denial of due process. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., granted defendants summary judgment on § 1983 claim on ground there was no state action and granted dismissal at close of case on claims under statutes providing all persons shall have same rights as white citizen and providing cause of action for conspiracy to interfere with civil rights on ground physician had not established prima facie case of discrimination. Physician appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) physician's assertion that he was East Indian was sufficient to put him within protection of statutes providing all persons shall have same rights as white citizens and providing cause of action for conspiracy; (2) ruling that physician had failed to establish prima facie case of discrimination for purposes of those statutes was too incomplete to affirm; and (3) "state action" requirement of § 1983 was satisfied by involvement

of hospital authority, which was public corporation created by statute to serve public purpose, even though authority had no direct input on day-to-day opertion of hospital.

Reversed and remanded.

Before CLARK, Chief Judge, REAVLEY and WILLIAMS, Circuit judges.

CLARK, Chief Judge:

Plaintiff, Dr. Alimadad Jatoi, appeals the district court's judgment in favor of the defendants, Hurst-Euless-Bedford (HEB) Hospital Authority, HEB Hospital Medical Board, HEB Hospital Board of Trustees, and Methodist Affiliated Hospitals.[1] Dr. Jatoi sued the defendants under 42 U.S.C. §§ 1981, 1983 and 1985 alleging they discriminated against him by terminating his medical staff privileges on the basis of his national origin and alienage, and that the termination procedures denied him due process. The district court granted the defendants' summary judgment on the section 1983 claim on the ground there was no state action. The remainder of the case was tried without a jury. At the close of Dr. Jatoi's case, the defendants moved for dismissal of the § 1981 and § 1985 claims under Federal Rule of Civil Procedure 41(b). The district

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[1] The defendants assert that Methodist Affiliated Hospitals had nothing to do with this case and should not be a defendant. They have not however, made a motion on that issue. The defendants also assert that the Authority and the Medical Board were never served with notice of process and therefore did not file answers in this case. Again there is no indication in the record that this issue was raised in the trial court and the defendants mention it without elaboration in their brief to us. We leave it to the district court to address these issues in the first instance when and if they are properly raised.

court granted the motion on the ground that Dr. Jatoi had not established a prima facie case of discrimination. Dr. Jatoi appealed. We reverse both the grant of summary judgment on the § 1983 claim, and the dismissal of the § 1981 and § 1985 claims.

1. BACKGROUND

The HEB Hospital Authority is a municipal corporation created by Texas statute. The Authority has the power to construct and manage a hospital, with the right to issue bonds to raise revenues. The Authority raised the necessary funds and constructed the HEB hospital.

The Authority began operation of the hospital in 1973, but due to financial difficulties, in 1974 the Authority entered into an agreement with Harris Hospital-Methodist (Harris) to provide additional funds and assume operation of the hospital. Harris created a new, non-profit corporation, HEB Hospital, and appointed the hospital's Board of Trustees. The Authority leased the hospital to the new corporation. After this claim arose, the Authority sold the hospital to Harris.

The HEB Hospital Board of Trustees is the decision-making body for management of the hospital. The hospital has a Medical Board composed of doctors from the various medical departments. The Medical Board makes recommendations to the Board of Trustees on decisions affecting medical personnel. The Board of Trustees then makes the actual decision. If requested, the Board of Trustees reported its personnel decisions to the HEB Hospital Authority. It also submitted financial reports to the Authority. The Authority continued to raise revenues for the hospital.

Dr. Jatoi was born in Pakistan and received his

medical training in India and in England, where he was certified as a general surgeon. He considers himself an East Indian. In 1967 Dr. Jatoi became a United States citizen. When the HEB Hospital opened in 1973, Dr. Jatoi was admitted to the medical staff with general surgery privileges.

Dr. Jatoi's emergency room trauma privileges were restricted in 1975 and he was later required to have a consultation before performing appendectomies. At one point the hospital Administrator told Dr. Jatoi that the Chief of Staff was restricting Jatoi's privileges because "this doctor is a bigot." At another time, a member of the Medical Board, Dr. Alldredge, told one of Dr. Jatoi's patients, "I guess they think they'll have an American doctor that could do something for you."

Doctors at the hospital were reviewed and considered for reappointment to the staff every two years. When Dr. Jatoi was reviewed in 1981, the Medical Board recommended to the Board of Trustees that he not be reappointed. Dr. Jatoi appealed this recommendation and was given a hearing by the Medical Board. Before the hearing he was given a "Fact Summary" listing some of his patients and the treatment he had given them. He was not told what questions would be raised about the treatment of these patients. Dr. Jatoi asserts he was not allowed to have a lawyer cross-examine witnesses at the hearing and was not allowed to bring in any medical witness who was not a member of the local Medical Society.

A month after the hearing, the Medical Board decided to uphold its recommendation not to reappoint Dr. Jatoi and the hospital's Board of Trustees adopted that recommendation. This decision was communicated to the Hospital Authority. Dr. Jatoi then brought this action.

II. SECTION 1981 AND 1985 CLAIMS

A. Racial Discrimination

The defendants launch two basic attacks on Dr. Jatoi's claims under 42 U.S.C. § 1981 and § 1985:[2] (1) they assert Dr. Jatoi is not a member of a protected group under § 1981; and (2) they assert his claim is improper because it is based on national origin and alienage rather than race.

The defendants argue that East Indians are not a protected group under § 1981, presumably because anthropologists classify East Indians as caucasians. We note at the outset that the Supreme Court has held that § 1981 protects caucasians as well as minorities from discrimination on the basis of their race. *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 287-96, 96 S.Ct. 2574, 2582-86, 49 L.Ed.2d 493 (1976).

[1-3] Furthermore, this circuit has refused to limit the protection of § 1981 to taxonomically defined racial groups. *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111,115 (5th Cir. 1986) (adopting the analysis in *Al-Kyazraji v. Saint Francis College*, 784 F. 2d 505, 514-18 (3d Cir.1986)). To come within § 1981 plaintiff need only allege he suffered discrimination based on his membership in a group that is commonly perceived to be "racial" because it is ethnically and physiognomically distinct. *Id. Al-Khazraji* interprets the statute to mandate that all persons be treated equally without regard to color or race. A label cannot control the substance of an action if we are to be obedient to the legislative purpose of § 1981. Dr. Jatoi's assertion that he

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[2] The issues are the same for the § 1981 claim and the § 1985 claim. We will, therefore, explicity discuss only the § 1981 claim but our discussion applies to § 1985 as well.

is East Indian is sufficient to put him within the statute's protection.[3]

[4] The defendants also contend that Dr. Jatoi must explicitly plead he suffered *racial* discrimination in order to state a claim under § 1981. We have organized the difficulty in distinguishing discrimination based on national origin from that based on race. *Bullard v. Omi Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. 1981). Consistency requires that our analysis regarding the definition of a protected group control this issue as well. When a plaintiff asserts he has suffered discrimination based on his membership in a group that is commonly perceived as "racial" because it is ethnically and physiognomically distinct, we will treat the case as asserting a claim under § 1981 whether he labels that discrimination as based on "national origin" or on "race".

[5] In this case, Dr. Jatoi was clearly not asserting the alleged discrimination was based on his birth in the nation of Pakistan. Dr. Jatoi considered Dr. Gandhi,who was born in India, to be a member of the same group. Dr. Jatoi was asserting the discrimination was based on his East Indian ethnic and physiognomic status, not on national boundaries. He has, therefore, stated a claim under § 1981.

[6] Dr. Jatoi also asserted he suffered discrimination based on alienage. We have permitted claims based on

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[3] The defendants also assert Dr. Jatoi is not in a protected group because roughly 30% of the medical staff at HEB Hospital is East Indian. This argument is completely illogical. Racial discrimination can occur in situations where a large percentage of the employees are members of the same racial group as the plaintiff. The plaintiff may have a more difficult task in proving discrimination under such circumstances, but that difficulty does not deny the plaintiff status as a part of a protected group.

alienage to be brought under § 1981. *Ramirez v. Sloss*, 615 F.2d 163, 167 n. 5 (5th Cir.1980). There is no foundation for this claim in this case, however, because Dr. Jatoi is a United States citizen.

B. Prima Facie Case

The district court held that Dr. Jatoi had failed to establish a prima facie case of discrimination under 42 U.S.C. § 1981. That ruling is too incomplete to affirm.

[7,8] To establish a prima facie case under section 1981, a plaintiff must produce direct or circumstantial evidence of purposeful discrimination by the defendant. *Ramirez v. Sloss*, 615 F.2d 163, 168 (5th Cir.1980). The four criteria from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) are sufficient to establish a circumstantial prima facie case. *Chaline v. KCOH, Inc.*, 693 F.2d 477, 480 (5th Cir.1982) (applying *McDonnell Douglas* to claims under 42 U.S.C. § 1981). In the context of an employment discharge case, the four *McDonnell Douglas* steps are: (1) the plaintiff belongs to a protected group; (2) the plaintiff was qualified for a particular position; (3) the plaintiff was discharged from that position; and (4) the plaintiff was replaced by a nonminority. *McDonnell Douglas*, 93 S.Ct. at 1824; *Chaline*, 693 F.2d at 480.

[9,10] While proof of all four of the *McDonnell Douglas* criteria will establish a circumstantial prima facie case, such proof is not the exclusive means of establishing a plaintiff's preliminary burdens. In *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir. 1982) the plaintiff established the first three criteria but could not establish the fourth because his position had been filled by another minority. As we stated in *Byrd*, "[t]he focus of the inquiry may not be observed by the blindered recitation of a

litany." 687 F.2d at 86. If a plaintiff cannot establish some or all of the *McDonnell Douglas* steps, the district court must examine all the evidence that has been adduced for other indicia of racial discrimination relating to his discharge and determine whether it is more likely than not that the employer's actions were based on illegal discriminatory criteria. *Id.*

[11] In this case it is not clear what criteria the district court used to determine whether Jatoi had established a prima facie case. Although the district court referred to *McDonnell Douglas* as the appropriate standard, the court did not make findings on the four *McDonnell Douglas* criteria, nor did the court explain what other criteria it might have examined.

The defendants contend that Dr. Jatoi did not establish the *McDonnell Douglas* criteria. In particular they contend he did not show he was qualified for the position and did not show he was replaced by a nonminority. Since the district court did not make findings on these issues, we do not pass judgment on them. On remand, the defendants can make these arguments to the district court.

[12] Dr. Jatoi contends that he did not have to establish the *McDonnell Douglas* criteria because he made his prima facie case by direct evidence of discrimination. The district court rejected this contention finding that "At best, Plaintiff's evidence establishes only that Plaintiff and one other member of his racial and national origin group *felt* they were the victims of discrimination." Jatoi points to a statement made by Dr. Alldredge, a member of the Medical Board, to one of Dr. Jatoi's patients in which Dr. Alldredge said, "I guess they think they'll have an American doctor that could do something for you." Dr. Jatoi also relies on testimony by Dr. Weinberg, another surgeon at HEB Hospital, that race might have been a

factor in Dr. Jatoi's termination and statements by doctors Weinberg and Baugh that Dr. Jatoi is a good doctor. He also points to testimony by Dr. Gandhi, a doctor from India, that Dr. Gandhi reduced his use of HEB Hospital because he experienced discrimination there.

To the extent the district court may have held that Dr. Jatoi did not establish a prima facie case through direct evidence, it was correct. The statement by Dr. Alldredge and the testimony of doctors Weinberg, Baugh, and Gandhi are not enough to make it more likely than not that Dr. Jatoi's termination was discriminatorily motivated. *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978).

[13] The defendants assert that even if Dr. Jatoi did establish a prima facie case, the judgment should be affirmed because in the process of presenting his case Dr. Jatoi produced evidence showing the defendants had non-discriminatory reasons for his termination.[4] The defendants' burden of showing non-discriminatory reasons can be met during the presentation of the plaintiff's case. *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346-47 n. 3 (5th Cir.1985); *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1290 n. 3 (5th Cir.1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 975, 79 L.Ed.2d 213 (1984). If the district court had made a finding that the defendants had met their burden in this case, we could review that finding.

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[4] *McDonnell Douglas*, which analyzed the separate burden shifting steps at each stage of proof, pointed out that once the plaintiff establishes a prima facie case the burden shifts to the defendants to show non-discriminatory reasons for their actions, the plaintiff then has the opportunity to show those reasons are merely a pretext for discrimination. *McDonnell Douglas*, 411 U.S. 792 at 802-05, 93 S.Ct. 1817 at 1824-25; *see also Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822, 824 (5th Cir. 1986) (applying the *McDonnell Douglas* steps to claims under 42 U.S.C. § 1981).

The district court, however, found only that Dr. Jatoi had not established a prima facie case. We cannot make further findings for the trial court.

On remand, if the case is to be decided on the basis of whether a prima facie case had been made, the district court should make findings on each of the *McDonnell Douglas* criteria. If those criteria are not met, the court should search the evidence for other indicia of discriminatory motives and determine if it is more likely than not that Dr. Jatoi's termination was due to illegal discrimination under section 1981.

III. State Action and 42 U.S.C. § 1983

[14] Under 42 U.S.C. § 1983 Dr. Jatoi claimed that the defendants violated his right to due process. The defendants moved for summary judgment on this claim, asserting that the HEB Hospital Authority[5] was not involved in the decision to terminate Dr. Jatoi's privileges, therefore the action was taken solely by private parties and the "state action" requirement of section 1983 had not been met. The district court granted the motion for summary judgment because it erroneously concluded that this case is controlled by *Madry v. Sorel*, 558 F.2d 303 (5th Cir.1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978).

Madry and the case the *Madry* panel relied upon, *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975), are distinguishable from this case. In *Greco*, a doctor sued the Orange Memorial Hospital under section 1983 after the hospital instituted a policy preventing him from performing abortions. The Orange Memorial

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[5] The defendants admit that the Hospital Authority is a state actor.

Hospital was largely funded with public bonds and the county owned both the land and the buildings. A non-profit corporation leased the facilities for a nominal fee and assumed all responsibility for operation of the hospital.

The plaintiff in *Greco* asserted the case was controlled by the Supreme Court's decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). In *Burton* the City of Wilmington created the Authority to provide public parking facilities. Public bonds were used to finance construction of a parking garage. The Authority entered into a long term lease with a restaurant in the building, a restaurant that adopted a racially discriminatory policy. The Supreme Court held that the discriminatory policy was "under color of state law" because the restaurant was part of a public building devoted to a public service. The Authority and the restaurant enjoyed a mutually beneficial relationship, making the State a joint participant in the discriminatory activity. 81 S.Ct. at 862.

In *Greco* the panel distinguished *Burton* on the ground that Orange County merely owned the realty and had no control over the operation of the facility. The panel also noted that *Greco* did not involve racial discrimination. 513 F.2d at 879.

In *Madry* a doctor's privileges were suspended after he sterilized a welfare patient without her written consent. The doctor sued the Brevard Hospital, a private hospital that received public funds. He asserted the state action requirement was met because a number of public officials were *ex officio* members of the hospital's Board of Governors. The panel disagreed and held there was no state action because these board members had merely a ceremonial role. 558 F.2d at 306. The panel in *Madry* relied upon *Greco* without discussing *Burton*.

In later cases, the Supreme Court has continued to develop the concept of state action announced in *Burton*. *E.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (claim based on violation of right to free speech and due process); *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (claim based on violation of right to due process). *Rendell-Baker* and *Blum* are also distinguishable from the present case because the defendants in those cases operated private facilities that received some public funds, whereas the HEB Hospital was publicly owned and was entirely constructed with public funds. In *Rendell-Baker* and *Blum* the state did not benefit financially from the private operation of the facility. In this case, repayment of the bonds used to construct the hospital was directly linked to operation of the hospital.

Burton, not *Greco* or *Madry*, must be the controlling precedent here. The HEB Hospital Authority, like the Wilmington Parking Authority, is a public corporation created by statute to serve a public purpose. As in *Burton*, the facilities were publicly owned and were constructed with public funds. As in *Burton*, the Authority derived a direct financial benefit from its private lessee. *See Burton*, 365 U.S. at 723, 81 S.Ct. at 861. The Hospital Authority's repayment of the bonds it issued and the mortgages it entered into were dependent on successful operation of the hospital. The Authority continued to finance the hospital through bonds, mortgages and local fundraising. The link between the state and the private manager of the hospital is made especially clear by the fact that the Authority initially operated the hospital itself. The private manager took over a job formerly performed by the state for the public benefit.

Although the Authority had no direct input on day-to-day operation of the hospital, it was informed of decisions, including the decision to terminate Dr. Jatoi's privileges. The defendants contend that the Authority had no control over actions by the private manager. The

Authority, however, was the lessor of the facility and continued to hold the purse strings. It monitored the activity of its lessee and retained the ability to prevent or control racial discrimination by its private manager. The Authority cannot benefit from private management of the hospital and at the same time insulate itself from liability for racial discrimination by that manager. The private defendants cannot receive public funds, utilize public facilities, and serve a public purpose, yet insist that their private status forestalls any correction of a violation of the constitutional rights of their medical staff.

Conclusion

We reverse the district court's summary judgment on the claim under 42 U.S.C. § 1983. We vacate the district court's judgment that Dr. Jatoi did not establish a prima facie case under 42 U.S.C. § 1981 and § 1985. The cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX H

A.M. JATOI, MD, Plaintiff-Appellant,

v.

HURST-EULESS-BEDFORD HOSPITAL AUTHORITY, et al., Defendants-Appellees.

No. 85-1745.

United States Court of Appeals,
Fifth Circuit.

June 18, 1987.

Physician who was not reappointed to medical staff brought civil rights action alleging discrimination on basis of natural origin and alienage and denial of due process. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, Chief Judge, granted defendant summary judgment on § 1983 claim and granted dismissal under §§ 1981 and 1985. Physician appealed. The Court of Appeals, 807 F.2d 1214, reversed and remanded. On petition for rehearing, the Court of Appeals held that plaintiff seeking relief under § 1981 was not required to allege that he or she suffered discrimination based on his or her membership in group that was ethnically and physiognominally distinct.

Suggestion for rehearing en banc denied.

Art Brender, Law Offices of Art Brender, Fort Worth, Tex., for plaintiff-appellant.

William B. Schur, Tom B. Renfro, Wynn, Brown,

Mack, Renfro & Thompson, Fort Worth, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

June 18, 1987

(Opinion January 14, 5th Cir.1987, 807 F.2d 1214)

Before CLARK, Chief Judge, REAVLEY, and WILLIAMS, Circuit Judges.

PER CURIAM:

On Petition for Rehearing the panel modifies its opinion to include the tests for racial discrimination in § 1981 cases announced by the Supreme Court in *Saint Francis College, et al. v. Al-Khazraji,— U.S. —, —, 107 S.Ct. 2022, 2026, 95 L.Ed.2d 582 (1987). In St. Francis* the Supreme Court explained that "a distinctive physiognomy is not essential to qualify for § 1981 protection." This test modifies the statement in our original opinion that a plaintiff must allege he suffered discrimination based on his membership in a group that is ethnically and physiognomically distinct. 807 F.2d at 1218.

On remand defendant Methodist Affiliated Hospitals will have the opportunity to seek dismissal of the case against it based on the assertion it made to this Court that no evidence has connected it to Dr. Jatoi's claims.

No member of this panel nor Judge in regular active service on this Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX I

TEXAS HOSPITAL AUTHORITY ACT, TEX. REV. CIV. STAT. ANN. art. 4437e

(as amended and effective between June 13, 1979, and August 30, 1981, with amendments effective August 31, 1981, inserted)

Art. 4437e. Hospital Authority Act

Creation; title

Section 1. Hospital Authorities without taxing power may be created as hereinafter provided. This law shall be known as the "Hospital Authority Act."

Definitions

Sec. 2. As used in this law "City" means any incorporated city or town in this State;

"Governing Body" means the council, commission or other governing body of a City;

"Authority" means a Hospital Authority created under this Act;

"Board" or "Board of Directors" means the board of directors of the Authority;

"Bond" or "Bonds" means bonds or notes;

"Bond Resolution" means the resolution authorizing the issuance of revenue bonds;

"Trust Indenture" means the mortgage, deed of trust or other instrument pledging revenues of, or creating a mortgage lien on properties, or both, to secure the revenue bonds issued by the Authority;

"Trustee" means the trustee under the Trust Indenture;

"Hospital" or "Hospitals" means any "Hospital Project" as defined in Section 3(g) of Senate Bill No. 243,

as enacted, Acts of the 64th Legislature, Regular Session, 1975, as now or hereafter amended.[1]

Ordinance creating authority; territory; body politic and corporate; powers

Sec 3. When the Governing Body of a City shall find that it is to the best interest of the City and its inhabitants to create a Hospital Authority, it shall pass an ordinance creating the Authority and designating the name by which it shall be known. If the Governing Bodies of two (2) or more Cities shall find it is to the best interest of such Cities to create an Authority to include such Cities, each Governing Body shall pass an ordinance creating the Authority and designating the name by which it shall be known. The Authority shall comprise only the territory included within the boundaries of such City or Cities and shall be a body politic and corporate. It shall have the power of perpetual succession, have a seal, may sue and be sued and may make, amend and repeal its bylaws.

Board of directors

Sec. 4. (a) The Authority shall be governed by a Board of Directors consisting of not less than seven (7) nor more than (11) members to be determined at the time of creating the Authority. Unless otherwise provided in the resolution authorizing the issuance of bonds or the Trust Indenture securing them, the number of Directors may be increased or decreased from time to time by amendment to the ordinance creating the Authority adopted by the Governing Body of the City or ordinances creating the Authority adopted by the Governing Bodies of the Cities, but no decrease in number shall have the effect of shortening the term of any incumbent Director. Except as hereinafter in this Section provided, the first Directors shall be appointed by the Governing Body of the City or by

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[1] Classified as art. 4437e—2.

the Governing Bodies of the Cities, and they shall serve until their successors are appointed as hereinafter provided. If Authority includes more than one City, each Governing Body shall appoint as equal number of Directors unless otherwise agreed by the cities. When the Authority issues its revenue bonds the resolution authorizing the issuance of the bonds or the Trust Indenture securing them may prescribe the method of selecting and the term of office of a majority of the members of the Board. The remaining members of the Board shall be appointed by the Governing Body of the City or the Governing Bodies of the Cities for two (2) year terms. The Trust Indenture may also provide that, in event of default as defined in the Trust Indenture, the Trustee may appoint all of the Directors, in which event the terms of the Directors then in office shall automatically terminate. Unless and until provision is made in the Bond Resolution or Indenture in connection with the issuance of bonds for the appointment by other means of part of the Directors, all of the Directors shall be appointed by the Governing Body of the City or each of the Cities, as the case may be, for terms not to exceed two (2) years, but the terms of Directors appointed prior to the issuance of the first issue of revenue bonds shall be subject to the exercise of the provision herein made for appointment of a majority of the members of the Board in connection with the issuance of the bonds. No officer or employer of any such City shall be eligible for appointment as Director. Directors shall not receive compensation for services but shall be entitled to reimbursement of their expenses incurred in performing such service.

(b) In the event the Authority purchases from a nonprofit corporation a hospital then in existence or in process of construction, the first members of the Board of Directors and their successors shall be determined as provided in the contract of purchase.

Officers; quorum; committees; manager or executive director; lease; legal counsel

Sec. 5. The Board of Directors shall elect from among their members a president and vice-president, and shall elect a secretary and a treasurer who may not be Directors, and may elect such other officers as may be authorized by Authority's bylaws. The offices of secretary and treasurer may be combined. The president shall have the same right to vote on all matters as other members of the Board. A majority of the members of the Board shall constitute a quorum and when a quorum is present action may be taken by a majority vote of Directors present. If the bylaws so provide, the Board of Directors, by resolution adopted by a majority of the Directors in office, may designate one or more committees, which, to the extent and in the manner provided in such resolution or in the bylaws, shall have and exercise the authority of the Board of Directors in the management of the Authority. Each such committee shall consist of two or more persons who are directors and may have additional nonvoting members who, if such resolution or the bylaws so provide, need not be directors. The Board of Directors may not, however, provide for the delegation to such committees of the Authority of the power to issue bonds, enter into or amend a lease of a Hospital or a management agreement with respect to a Hospital or to employ or discharge a manager or an executive director. The Board may employ a manager or executive director of the Hospital and such other employees, experts and agents as it may see fit, or enter into a management agreement with any person and it may delegate to the manager the power to manage the Hospital and to employ and discharge employees. The Board may lease the Hospital as otherwise provided by law and may employ legal counsel.

Sec. 5 as amended, effective Aug. 31, 1981:

Sec. 5. The Board of Directors shall elect from among their members a president and vice-president, and shall elect a secretary and a treasurer who may not be Directors, and may elect such other officers as may be authorized by Authority's bylaws. The offices of secretary and treasurer may be combined. The president shall have the same right to vote on all matters as other members of the Board. A majority of the members of the Board shall constitute a quorum and when a quorum is present action may be taken by a majority vote of Directors present. If the bylaws so provide, the Board of Directors, by resolution adopted by a majority of the Directors in office, may designate one or more committees, which to the extent and in the manner provided in such resolution or in the bylaws, shall have and exercise the authority of the Board of Directors in the management of the Authority. Each such committee shall consist of two or more persons who are directors and may have additional nonvoting members who, if such resolution or the bylaws so provide, need not be directors. The Board of Directors may not however, provide for the delegation to such committees of the Authority of the power to issue bonds, enter into or amend a lease of a Hospital or a management agreement with respect to a Hospital or to employ or discharge a manager or an executive director. The Board may employ a manager or ececutive director of the Hospital and such othe employees, experts and agents as it may ssee fit, or enter into a management agreement with any person and it may delegate to the manager the power to manage the Hospital and to employ and discharge employees. The Board may sell, lease or close the Hospital as otherwise provided by law and may employ legal counsel.

Construction, operation and equipment of hospitals; location; sale of property

Sec. 6. (a) The Authority shall have the power to construct, enlarge, furnish and equip Hospitals, purchase

existing Hospitals, furnishings and equipment for its Hospitals, and to operate and maintain Hospitals. A Hospital need not be located within the City or Cities.

(b) The Authority may sell any of its property without an election to a political subdivision of the State for the fair market value of the property if:

(1) the Board of Directors has notice of its intention to sell the property, a description of the property, and the scheduled date of the sale published in a newspaper or newspapers providing general circulation in the Authority once each week for two consecutive weeks, the first publication at least 14 days before the scheduled date of the sale; and

(2) a petition requesting an election on a proposition for or against the sale, signed by 10 percent or more of the qualified voters residing in the Authority is not presented to the secretary or president of the Board of Directors before the scheduled date of the sale.

(c) If a petition described in Subdivision (2), Subsection (b) of this section is presented to the secretary or president of the Board of Directors before the scheduled date of the sale, the property may be sold to a political subdivision only if an election on the proposition is held and a majority of the qualified voters voting in the election favor the sale. The Board shall call the election on receiving the petition or may call the election on its own motion if no petition is filed. The Board shall determine and the order calling the election shall specify the date, place, or places of holding the election, the form of ballot, and the presiding judge, alternate judge, and clerks for each voting place. Section 9b, Texas Election Code (Article 2.01b, Vernon,s Texas Election Code), does not apply to the election. A substantial copy of the election order shall be published in a newspaper or newspapers of general circulation in the Authority once a week for two consecutive weeks, the first

publication to appear at least 30 days before the election date. The form of the ballots at the election shall be in conformity with Section 61, Texas Election Code, as amended (Article 6.05, Vernon's Texas Election Code), so that ballots may be case for or against the following proposition: "The sale of . . . . . by the . . . . . Hospital Authority." The Board shall canvass the returns and announce the results. Except as specifically provided in this section, the election shall be governed by the Texas Election Code.

(d) The Board may sell real property acquired by donation, gift, or purchase that the Board determines is not needed for Hospital purposes if the sale does not contravene (1) a trust indenture or bond resolution relating to outstanding bonds of the Authority, or any prior restrictions or limitations placed on the use of the property, or (2) any agreement entered into either prior to or after the effective date of this Section 6(d) between the Authority and a non-profit corporation under the provisions of Senate Bill No. 243, as enacted, Acts fo the 64th Legislature, Regular Session, 1975.[1] The Board shall sell the property through sealed bids or at a public auction. If the Board conducts the sale by sealed bids, the Board shall provide notice of the sale in the manner provided by Chapter 455, Acts of the 61st Legislature, Regular Session, 1969, as amended (Article 5421c-12, Vernon's Texas Civil Statutes). If the Board conducts the sale by public auction, the Board shall publish notice of the sale, including a description of the property and the date, time, and place of the auction, in a newspaper with general circulation in each City of the Authority once a week for three consecutive weeks, the first notice to appear at least 20 days before the auction. Nothing in this Section 6(d) is intended to affect or amend the powers granted to the Authority by Senate Bill No. 243, as

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[1] Article 4437e-2.

enacted, Acts of the 64th Legislature, Regular Session, 1975.

Revenue bonds

Sec. 7. The Authority may issue revenue bonds to provide funds for any of its purposes. Such bonds shall be payable from and secured by a pledge of all or any designated part of the revenues to be derived from the operation of the Hospital or Hospitals and any other revenues resulting from the ownership of the Hospital properties. The bonds may be additionally secured by a mortage or deed of trust on real property of Authority or by a chattel mortgage on its personal property, or by both.

Procedure for bond issue; requisites; maturity; sales; registration

Sec. 8. The bonds shall be authorized by resolution adopted by a majority vote of a quorum of the Board of Directors, and shall be signed by the president or vice-president and countersigned by the secretary, or either or both of their facsimile signatures may be printed thereon. The seal of the Authority shall be impressed or printed thereon. The bonds shall mature serially or otherwise in not to exceed forty (40) years and may be sold at a price and under terms determined by the Board of Directors to be the most advantageous reasonably obtainable, provided that the net effective interest rate as defined by law in Article 717k-2 does not exceed ten per cent (10%) per annum, and within the discretion of the Board, may be made callable prior to maturity at such times and prices as may be prescribed in the resolution authorizing the bonds, and may be made registrable as to principal or as to both principal and interest.

Legal and authorized investments

Sec. 8a. All bonds issued under this Act, as amended, shall be legal and authorized investments for all banks, savings banks, trust companies, building and loan associations, savings and loan associations, and insurance companies of all kinds and types, and for the interest and sinking funds and other public funds of any issuer, as such term is defined in this Act. Said bonds also shall be eligible and lawful security for all deposits of public funds of the State of Texas and of any issuer, as such term is defined in this Act, to the extent of the value of said bonds, when accompanied by any unmatured interest coupons appurtenant thereto.

Bond resolution; publication; referendum

Sec. 9. (a) Before authorizing the issuance of bonds, other than refunding bonds, the Board of Directors shall cause a notice to be issued stating that it intends to adopt a resolution (herein called "Bond Resolution") authorizing the issuance of the bonds, the maximum amount thereof, and the maximum maturity thereof. The notice shall be published once each week for two (2) consecutive weeks in a newspaper or newspapers having general circulation in the Authority, the first such publication shall be at least fourteen (14) days prior to the day set for adopting the Bond Resolution.

(b) If, prior to the day set for the adoption of the Bond Resolution, there is presented to the secretary or president of the Board of Directors a petition signed by not less than ten per cent (10%) of the qualified voters residing within the boundaries of the City or Cities comprising the Authority, who own taxable property in the Authority and who have duly rendered the same for taxation to the City in

which such property is located or situated, requesting an election on the proposition for the issuance of the bonds, the bonds shall not be issued unless an election is held and a majority vote is in favor of the bonds. Such election shall be called and held in accordance with the procedure prescribed in Chapter 1, Title 22, Revised Civil Statutes of 1925, as amended,[1] with the Board of Directors, president and secretary performing the functions therein assigned to the governing body of the City, the mayor and city secretary respectively. If no such petition is filed the bonds may be issued without an election. It is provided, however, that the Board of Directors may call such election on its own motion without the filing of the referendum petition.

Junior lien bonds; parity bonds

Sec. 10. Bonds constituting a jurior lien on the revenues or properties may be issued unless prohibited by the Bond Resolution or Trust Indenture. Parity bonds may be issued under conditions specified in the Bond Resolution or Trust Indenture.

Money set aside out of bond sale proceeds

Sec. 11. Money for the payment of not more than two (2) years interest on the bonds and an amount estimated by the Board to be required for operating expenses during the first year of operation and an amount to fund any bond reserve fund or other reserve funds provided for in the Bond Resolution or Trust Indenture may be set aside for those purposes out of the proceeds from the sale of the bonds.

Refunding outstanding bonds

Sec. 12. Bonds may be issued for the purpose of

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[1] Article 701 et seq.

refunding outstanding bonds in the manner provided in this Act for other bonds, and may be exchanged by the Comptroller of Public Accounts of the State of Texas or sold and the proceeds applied in accordance with the procedure prescribed in Chapter 503, Acts of the Fifty-fourth Legislature[1] or other applicable law.

Approval of bonds by attorney general; registration; incontestability; negotiability

Sec. 13. Bonds issued under this Act and the record relating to their issuance shall be submitted to the Attorney General of Texas and if he finds that they have been issued in accordance with this law and constitute valid and binding obligations of the Authority and are secured as recited therein he shall approve them, and they shall be registered by Comptroller of Public Accounts of the State of Texas who shall certify such registration thereon. Thereafter they shall be incontestable. The bonds shall be negotiable and shall contain the following provision: "The holder hereof shall never have the right to demand payment thereof out of money raised or to be raised by taxation."

Sec. 14. The Hospital shall be operated without the intervention of private profit for the use and benefit of the public. If the Hospital is not being used, operated, or acquired by a nonprofit corporation under the provisions of the Hospital Project Financing Act (Article 4437e—2, Vernon's Texas Civil Statutes) or not leased it shall be the duty of the Board of Directors to charge sufficient rates for services rendered by the Hospital and to utilize other sources of its revenues that revenues will be produced sufficient to pay all expenses in connection with the ownership, operation and upkeep of the Hospital, to pay the interest on the bonds as it becomes due, to create a sinking fund to pay the

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[1] Article 717k.

bonds as they become due, and to create and maintain a bond reserve fund and other funds as provided in the Bond Resolution or Trust Indenture. In the event the Hospital is being used, operated, or acquired by a nonprofit corporation under the provisions of the Hospital Project Financing Act (Article 4437e—2, Vernon's Texas Civil Statutes) or leased, it shall be the duty of the Board of Directors to provide that such nonprofit corporation or the lessee shall charge sufficient rates for services rendered by the Hospital which together with other sources of such nonprofit corporation's or the lessee's revenue will produce revenues sufficient to enable such non-profit corporation or the lessee to pay all expenses in connection with the operation and upkeep of the Hospital and to make payments or to pay lease rentals to the Authority which will be sufficient, when taken with other pledged sources of the Authority's estimated revenues, to pay the interest on the bonds as it becomes due, to create a sinking fund to pay the bonds as they become due, and to create and maintain a bond reserve fund and other funds as provided in the Bond Resolution or Trust Indenture. The Bond Resolution or Trust Indenture may prescribe systems, methods, routines, procedures, and policies under or in accordance with which the hospital shall be operated, and in the event the Hospital is being used, operated, or acquired by a nonprofit corporation or leased, the Authority may delegate to such nonprofit corporation or the lessee the duty to establish the systems, methods, routines, procedures, and policies under or in accordance with which the Hospital shall be operated.

Sec. 14, as amended effective Aug. 31, 1981:

Sec. 14. Unless the Hospital is being leased, it shall be operated by the Authority without the intervention of private profit for the use and benefit of the public. If the Hospital is not being used, operated, or acquired by a nonprofit corporation under the provisions of the Hospital

Project Financing Act (Article 4437e—2, Vernon's Texas Civil Statutes) or not leased it shall be the duty of the Board of Directors to charge sufficient rates for services rendered by the Hospital and to utilize other sources of its revenues that revenues will be produced sufficient to pay all expenses in connection with the ownership, operation and upkeep of the Hospital, to pay the interest on the bonds as it becomes due, to create a sinking fund to pay the bonds as they become due, and to create and maintain a bond reserve fund and other funds as provided in the Bond Resolution or Trust Indenture. In the event the Hospital is being used, operated, or acquired by a nonprofit corporation under the provisions of the Hospital Project Financing Act (Article 4437e—2, Vernon's Texas Civil Statutes) or leased, it shall be the duty of the Board of Directors to provide that such nonprofit corporation or the lessee shall charge sufficient rates for services rendered by the Hospital which together with other sources of such nonprofit corporation's or the lessee's revenues will produce revenues sufficient to enable such nonprofit corporation or the lessee to pay all expenses in connection with the operation and upkeep of the Hospital and to make payments or to pay lease rentals to the Authority which will be sufficient, when taken with other pledged sources of the Authority's estimated revenues, to pay the interest on the bonds as it becomes due, to create a sinking fund to pay the bonds as they become due, and to create and maintain a bond reserve fund and other funds as provided in the Bond Resolution or Trust Indenture. The Bond Resolution or Trust Indenture may prescribe systems, methods, routines, procedures, and policies under or in accordance with which the hospital shall be operated, and in the event the Hospital is being used, operated, or acquired by a nonprofit corporation or leased, the Authority may delegate to such nonprofit corporation or the lessee the duty to establish the systems, methods, routines, procedures, and

policies under or in accordance with which the Hospital shall be operated.

Depositories

Sec. 15. The Authority may select a depository or depositories according to the procedures provided by law for the selection of city depositories or it may award its depository contract to the same depository or depositories selected by the City or Cities and on the same terms.

Tax exemption

Sec. 16. Recognizing the fact that the property owned by Authority will be held for public purposes only and will be devoted exclusively to the use and benefit of the public, it shall be exempt from taxation of every character.

Eminent domain

Se. 17. For the purposes of carrying out any power conferred by this Act, Authority shall have the right to acquire the fee simple title to land and other property and easements by condemnation in the manner provided by Title 52, Revised Civil Statutes as amended,[1] relating to eminent domain. Authority is hereby declared to be a municipal corporation within the meaning of Article 3268 of said Title 52. The amount of and character or interest in land, other property and easements thus to be acquired shall be determined by the Board of Directors.

Investment of funds and proceeds of bonds

Sec. 18. The law as to the security for and the investment of funds, applicable to Cities, shall control, insofar as applicable the investment of funds belonging to Authority. The Bond Resolution or the Indenture or both may further restrict the making of such investments. In addition to

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[1] Article 3264 et seq.

other powers Authority shall have the right to invest the proceeds of its bonds, until such money is needed, in the manner authorized in the Bond Resolution or Indenture, and the proceeds of its bonds may be deposited in such banks and may be paid out pursuant to such terms as may be provided in the Bond Resolution or Trust Indenture.

Donations, gifts and endowments

Sec. 19. The Board of Directors is authorized to accept donations, gifts and endowments to be held and administered as may be required by the respective donors, to the extent that such requirements would not contravene law.

APPENDIX J

TEX. REV. CIV. STAT. ANN. art. 4437e—1
(as enacted and effective from June 14, 1973, through August 30, 1981)

Art. 4437e—1. Leases and agreements by hospital authorities

Section 1. In addition to any other powers which it may now or hereinafter have, the governing body of any hospital authority created as provided in the Hospital Authority Act (Vernon's Annotated Civil Statutes, Article 4437e) or the County Hospital Authority Act (Vernon's Annotated Civil Statutes, Article 4494r) is hereby authorized: (a) to lease to any person any hospital, or part thereof, owned by said hospital authority to be operated as a hospital by the lessee of same under such terms and conditions as may be satisfactory to the governing body and the lessee; (b) to enter into an agreement with any person for the management and/or operation of any hospital, or part thereof, owned by said hospital authority under such terms and conditions as may be satisfactory to the governing body and the other contracting party or parties.

Sec. 2. The word "person" where used in this Act includes individual, corporation, organization, government or governmental subdivision or agency, estate, trust, partnership, association, and any other legal entity.

Sec. 3. Any such lease or agreement shall be authorized by resolution adopted by such governing body and shall be executed, on behalf of the authority, by the presiding officer and the secretary of the governing body, and the seal of the authority shall be impressed thereon.

APPENDIX K

EXCERPTS FROM 1981 TEX. GEN. LAWS, CH. 583

67th LEGISLATURE—REGULAR SESSION Ch. 583

PUBLIC HOSPITALS—SALE, LEASE, OR CLOSURE

CHAPTER 583

S. B. No. 1067

An Act relating to the sale, lease, or closure of public hospitals; amending Sections 5 and 14, Hospital Authority Act, as amended; Sections 1 and 3, Chapter 528, Acts of the 63rd Legislature, Regular Session, 1973; Chapter 125, Acts of the 51st Legislature, Regular Session, 1949; Sections 5 and 14, County Hospital Authority Act, as amended (Article 4437e—1, 4494l and 4494r, Vernon's Texas Civil Statutes, respectively) and Article 4478, Revised Civil Statutes of Texas, 1925, as amended.

Be it enacted by the Legislature of the State of Texas:

[Sections 1-3 omitted]

Sec. 4. Sections 5 and 14, Hospital Authority Act, as amended (Article 4437e, Vernon's Texas Civil Statutes), are amended[15] to read as follows:

"Sec. 5. The Board of Directors shall elect from among their members a president and vice-president, and shall elect a secretary and a treasurer who may or may not be Directors, and may elect such other officers as may be authorized by Authority's bylaws. The offices of secretary and treasurer may be combined. The president shall have the same right to vote on all matters as other members of the Board. A majority of the members of the Board shall constitute a quorum and when a quorum is present action may be taken by a majority vote of Directors present. If the bylaws so provide, the Board of Directors, by resolution adopted by a majority of the Directors in office, may designate one or more committees, which, to the extent and

[15] Vernon's Ann.Civ.St. art. 4437e, §§ 5,14.

in the manner provided in such resolution or in the bylaws, shall have and exercise the authority of the Board of Directors in the management of the Authority. Each such committee shall consist of two or more persons who are directors and may have additional nonvoting members who, if such resolution or the bylaws so provide, need not be directors. The Board of Directors may not, however, provide for the delegation to such committees of the Authority of the power to issue bonds, enter into or amend a lease of a Hospital or a management agreement with respect to a Hospital or to employ or discharge a manager or an executive director. The Board may employ a manager or ececutive director of the Hospital and such other employees, experts and agents as it may see fit, or enter into a management agreement with any person and it may delegate to the manager the power to manage the Hospital and to employ and discharge employees. The Board may sell, lease, or close the Hospital as otherwise provided by law and may employ legal counsel."

"Sec. 14. Unless the Hospital is being leased, it shall be operated by the Authority without the intervention of private profit for the use and benefit of the public. If the Hospital is not being used, operated, or acquired by a nonprofit corporation under the provisions of the Hospital project Financing Act (Article 4437e—2, Vernon's Texas Civil Statutes) or not leased it shall be the duty of the Board of Directors to charge sufficient rates for services rendered by the Hospital and to utilize other sources of its revenues that revenues will be produced sufficient to pay all expenses in connection with the ownership, operation and upkeep of the Hospital, to pay the interest on the bonds as it becomes due, to create a sinking fund to pay the bonds as they become due, and to create and maintain a bond reserve fund and other funds as provided in the Bond Resolution or Trust Indenture. In the event the Hospital is being used, operated, or acquired by a nonprofit corpora-

tion under the provisions of the Hospital Project Financing Act (Article 4437e—2, Vernon's Texas Civil Statutes) or leased, it shall be the duty of the Board of Directors to provide that such nonprofit corporation or the lessee shall charge sufficient rates for services rendered by the Hospital which together with other sources of such nonprofit corporation's or the lessee's revenues will produce revenues sufficient to enable such nonprofit corporation or the lessee to pay all expenses in connection with the operation and upkeep of the Hospital and to make payments or to pay lease rentals to the Authority which will sufficient, when taken with other pledged sources of the Authority's estimated revenues, to pay the interest on the bonds as it becomes due, to create a sinking fund to pay the bonds as they become due, and to create and maintain a bond reserve fund and other funds as provided in the Bond Resolution or Trust Indenture. The Bond Resolution or Trust Indenture may prescribe systems, methods, routines, procedures, and policies under or in accordance with which the hospital shall be operated, and in the event the Hospital is being used, operated, or acquired by a nonprofit corporation or leased, the Authority may delegate to such nonprofit corporation or the lessee the duty to establish the systems, methods, routines, procedures, and policies under or in accordance with which the Hospital shall be operated."

Sec. 5. Chapter 528, Acts of the 63rd Legislature, Regular Session, 1973 (Article 4437e—1, Vernon's Texas Civil Statutes), is amended by amending[16] Sections 1 and 3 and by adding[17] Section 4 to read as follows:

"Section 1. In addition to any other powers which it may now or hereafter have, the governing body of any hospital authority created as provided in the Hospital Authority Act (Vernon's Annotated Civil Statutes, Article 4437e) or the County Hospital Authoirty Act (Vernon's Annotated Civil Statutes, Article 4494r) is hereby

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[16] Vernon's Ann.Civ.St. art. 4437e-1, §§ 1,3.

[17] Vernon's Ann.Civ.St. art. 4437e-1, § 4.

authorized: (a) to lease to any person any hospital, or part thereof, owned by said hospital authority to be operated as a hospital by the lessee of same under such terms and conditions as may be satisfactory to the governing body and the lessee; (b) to enter into an agreement with any person for the management and/or operation of any hospital, or part thereof, owned by said hospital authority under such terms and conditions as may be satisfactory to the governing body and the other contracting party or parties; (c) to sell a hospital or part of a hospital owned by the hospital authority; and (d) to close a hospital or part of a hospital owned or operated by the hospital authority."

"Sec. 3. (a) Any such sale, lease, closure, or agreement shall be authorized by resolution adopted by such governing body and shall be executed, on behalf of the authority, by the presiding officer and the secretary of the governing body, and the seal of the authority shall be impressed thereon.

"(b) The sale or closure of a hospital is contingent on the right of the votors by petition to require a referendum on the issue. The sale or closure may not take effect sooner than the expiration of the time for a petition to be filed under Section 4 of this Act and, if a valid petition is filed, the sale or closure is contingent on voter approval.

"Sec. 4. (a) If before the 31st day after the date on which the governing body authorizes the sale or closure of a hospital the governing body receives a petition signed by at least 10 percent of the qualified voters of the political subdivision requesting an election on the question, the governing body shall order and conduct an election. The number of qualified votors of the authority is determined according to the most recent official list of qualified voters.

"(b) If a majority of the qualified voters voting on the question approve the sale or closure, the hospital may be sold or closed."

[Sections 6-9 omitted.]

Passed the Senate on April 30, 1981: Yeas 31, Nays 0; Senate concurred in House amendments on June 1, 1981, by a viva-voce vote; passed the House, with amendments, on May 29, 1981: Yeas 138, Nays 8, two present not voting.

Approved June 15, 1981.

Effective Aug. 31, 1981, 90 days after date of adjournment.

APPENDIX L

TEX. CONST. art. 9, § 4

Sec. 4. The Legislature may by law authorize the creation of county-wide Hospital Districts in counties having a prpulation in excess of 190,000 and in Galveston County, with power to issue bonds for the purchase, acquisition, construction, maintenance and operation of any county owned hospital, or where the hospital system is jointly operated by a county and city within the county, and to provide for the transfer to the county-wide Hospital District of the title to any land, buildings or equipment, jointly or separately owned, and for the assumption by the district of any outstanding bonded indebtedness theretofore issued by any county or city for the establishment of hospital facilities; to levy a tax not to exceed seventy-five ($.75) cents on the One Hundred ($100.00) Dollars valuation of all taxable property within such district, provided, however, that such district shall be approved at an election held for that purpose, and that only qualified, property taxpaying voters in such county shall vote therein; provided further, that such Hospital District shall assume full responsibility for providing medical and hospital care to needy innhabitants of the county, and thereafter such county and cities therein shall not levy any other tax for hospital purposes; and provided further that should such Hospital District construct, maintain and support a hospital or hospital system, that the same shall never become a charge against the State of Texas, nor shall any direct appropriation ever be made by the Legislature for the construction, maintenance or improvement of the said hospital or hospitals. Should the Legislature enact enabling laws in anticipation of the adoption of this amendment, such Acts shall not be invalid because of their anticipatory character.

APPENDIX M

EXCERPTS FROM
TEX. REV. CIV. STAT. ANN. art. 4437(f)
(as effective prior to May 24, 1985)

Definitions

Sec. 2. For the purpose of this Act:

(e) The term "medical staff" means that physician or group of physicians, licensed to practice medicine by the Texas State Board of Medical Examiners, who by action of the governing body of a hospital, are privileged to work within and use the facilities of a hospital for or in connection with the observation, care, diagnosis or treatment of individuals who are, or may be, suffering from any disease or disorder, mental or physical, or any physical deformity or injury.

Medical staff memberships

Sec. 17. No provision or provisions of this Act shall in any way change, or modify, the authority or power of the Board of Managers, Board of Trustees, Board of Directors, or Governing Body of any hospital, as that term is defined herein, to make such rules, standards, or qualifications for "Medical Staff" membership, as they in their sole discretion may deem necessary or advisable, or to grant or refuse membership on such "Medical Staff."

EXCERPTS FROM
TEX. REV. CIV. STAT. ANN. art. 4437f
(as effective May 24, 1985)

Definitions

Sec. 2.

(e) The term "medical staff" means that physician or group of physicians licensed to practice medicine by the Texas State Board of Medical Examiners and that podiatrist or group of podiatrists licensed to practice podiatry by the Texas State Board of Podiatry Examiners

who by action of the governing body of a hospital are privileged to work within and use the facilities of a hospital for or in connection with the observation, care, diagnosis or treatment of individuals who are, or may be, suffering from any disease or disorder, mental or physical, or any physical deformity or injury.

Sec. 2(e) amended by Acts 1985, 69th Leg., ch. 153 § 1, eff. May 24, 1985.

Medical staff memberships

Sec. 17. (a) Except as otherwise provided by this action, no provision or provisions of this Act shall in any way change, or modify, the authority or power of the Board of Managers, Board of Trustees, Board of Directors, or Governing Body of any hospital, as that term is defined herein, to make such rules, standards, or qualifications for medical staff membership, as they in their sole discretion may deem necessary or admissible, or to grant or refuse membership on such medical staff.

(b) An applicant for medical staff membership may not be denied membership solely on the ground that the applicant holds a license to practice podiatry issued by the Texas State Board of Podiatry Examiners rather than a license to practice medicine issued by the Texas State Board of Medical Examiners.

(c) The process for considering applications for medical staff membership and privileges shall afford each applicant procedural due process.

(d) An applicant for medical staff membership or privileges may not be denied membership or privileges on any ground that is otherwise prohibited by law.

(e) The provisions of this Act do not automatically entitle a physician licensed by the Texas State Board of Medical Examiners or a podiatrist licensed by the Texas State Board of Podiatry Examiners to membership or privileges on a medical staff.

Sec. 17 amended by Acts 1985, 69th Leg., ch. 153 § 2, eff. May 24, 1985.